(1)

Supreme Court, U.S.

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No. _____

In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a trial court found on ample (and unchallenged) substantial evidence that the process used by a city as part of its rent control program was confiscatory, in that it denied the owners of a regulated mobile home park a reasonable return, and used *ad hoc* procedures the state supreme court aptly characterized as the product of "unjustified" "bureaucratic bungling" that consumed more in regulatory transactional costs than the amount in controversy,

1. Was it permissible for the California Supreme Court to hold that the mobile home park owners are barred from pursuing an action under 42 U.S.C. § 1983 for deprivations of both substantive and procedural due process, unless they first exhaust lengthy (and newly created for this case) state remedial procedures, in violation of *Patsy v. Board of Regents*, 457 U.S. 496 (1982)?

2. Was it permissible for the California Supreme Court to restrict due process recovery under 42 U.S.C. § 1983 to those cases in which the government "deliberately flouts the law," in conflict with other courts that use a broader standard?

3. Is it time for this Court to rectify California's maverick jurisprudence that conditions the availability of 42 U.S.C. § 1983 in land use cases on exhaustion of state law procedures, and return California to the constitutional regime laid down in *Felder v. Casey*, 487 U.S. 131 (1988)?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioners Roger and Virginia Galland respectfully pray that a Writ of Certiorari issue to review a final judgment and order of the Supreme Court of the State of California.

OPINIONS BELOW

The decision under review was filed on Feb. 5, 2001, and is reported as *Galland v. City of Clovis*, 24 Cal.4th 1003, 103 Cal.Rptr.2d 711 (2001). (App., p. 1.) A timely Petition for Rehearing was denied March 21, 2001 (App., p. 162), the same day the opinion was slightly modified (App., p. 85). The Court of Appeal's June 7, 1999 opinion (App., p. 84) appears at 87 Cal.Rptr.2d 1 (1999). Pertinent trial court rulings (unreported) are the Ruling on Motion for Peremptory Writ of Prohibition (Feb. 16, 1993) (App., p. 154), Amended Statement of Decision (Aug. 5, 1994) (App., p. 147), Statement of Decision Re: Liability, Damages and Writ of Prohibition (Oct. 10, 1995) (App., p. 142), and Amended Judgment (July 12, 1996) (App., p. 139).

JURISDICTION

The California Supreme Court summarily discarded decades of this Court's decisions applying 42 U.S.C. § 1983 by holding that the statute could not be enforced until after newly minted and convoluted state remedies had been unsuccessfully pursued, contrary to *Patsy v. Board of Regents*, 457 U.S. 496 (1982). Justice Janice Rogers Brown's dissent put it succinctly:

> "We now intervene to eviscerate a federal civil rights remedy whose very purpose is to provide an alternative to abusive or corrupt state adjudicative procedures like those the Gallands had to endure. . . . " (App., p. 65.)

In this case, the trial court found on ample evidence that the process through which Respondent City of Clovis ground down Mr. and Mrs. Galland for years in their

futile efforts to obtain city approval for minor rent increases for their mobile home park was so grotesquely unfair that it violated both procedural and substantive due process, resulting in rents that were confiscatory. The Court of Appeal affirmed a compensatory award under 42 U.S.C. § 1983.

The California Supreme Court, over two strong dissents (App., pp. 57, 64), reversed. Even the majority opinion conceded that the City's demands were "shifting, costly, and at times ill-considered" (App., p. 50), and the most positive spin it could put on the City's actions was to describe them as "bureaucratic bungling" (App., p. 49). Nonetheless, the California majority created a new "relief" process so Byzantine that it is no relief at all. The Gallands were denied their 42 U.S.C. § 1983 remedy and directed to resubmit themselves instead to the same people who had treated them arbitrarily and ask again for their help. Justice Brown's dissent highlighted the perversity:

> "[F]laws in Clovis's rent adjustment mechanism are the very basis of the due process claim. In this circumstance, it defies logic to impose the remedy of further rent adjustment proceedings. *Further administrative proceedings cannot possibly compensate for an injury caused by excessive administrative proceedings.*" (App., p. 69; emphasis added.)

In sum, the new procedure created by the California majority subordinates Section 1983 to state law and is contrary to this Court's decisions, of which the following is typical:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." (*Monroe v. Pape*, 365 U.S. 167, 183 [1961].)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . . "

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

STATEMENT OF THE CASE

A dozen years ago, Roger and Virginia Galland applied for a $6.00 per month rent increase for each of the 260 spaces at the mobile home park they own in Clovis, California, a total of some $1,560 per month for the entire park. Within the next year, they had to spend over $160,000 complying with the orders of the Clovis Rent Review Commission, which then denied the $6.00 increase. And that was just the beginning. Administrative costs for modest rent increases sought in 1988, 1989, and 1990 totaled more than $254,000 – *more than the rent increases would have brought.*

When the Gallands sought their 1988 rent increase they *de facto* entered a nightmarish parallel universe

where *ad hoc* administrative processing – largely consisting of pointless demands to shovel mounds of dated or useless information into an insatiable administrative maw – was paramount. Clovis had no written rules or guidelines for the information needed to support a rent increase. Instead, administrative proceedings generated continuing demands for whatever additional information *du jour* the various City functionaries thought of – to no useful purpose whatever.

The California Supreme Court would later describe Clovis' administrative process as "shifting," "costly," "inefficient," "ad hoc," "ill-considered," "bureaucratic bungling." (App., pp. 49, 50.)[1]

Although the $6 increase sought by the Gallands for 1988 was less than half the rate of inflation, under the Clovis scheme, if more than 50% of the tenants object to a proposed rent increase (which they did), then the burden is on the park owner to prove the increase is not unreasonable. The Gallands did so; they showed that their expenses had increased while their cash flow had decreased. They provided economic data from both the manager of the property and from a CPA to authenticate their position. But the Rent Control Commission and then the City Council (on administrative appeal) demanded more. And more. (App., pp. 6-7.) Lacking written guidelines, the City's demands rained down apparently whenever something occurred to someone in City Hall. Thus, the City demanded things like information regarding various CPI indexes; *ten years' worth* of financial information about vacancy rates, rent increases, average total receipts per month, and cash flows. Later, that ten year information demand would expand to include *seventeen other mobile home parks* not even owned by the Gallands, but

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[1] And then that Court wrote an opinion forcing the Gallands to submit to more of the same – and called that a remedy!

operated by the management company employed by the Gallands. The cost of compiling this information was more than $80,000. The City then demanded information about the purchase and financing of the park, an explanation of the concept of return on investment and risk factors both for the Gallands and for the mobile home park industry (both in general and as to other nearby parks in particular), and information about industry averages of such returns. (App., pp. 8-11.)

The City compounded its demands for information with unreasonable time schedules. Initially, for example, the Rent Control Commission demanded that much of the information noted above be produced in one week – and then denied the increase on the ground that the Gallands had not supplied enough of the demanded documentation.

As all three courts below recognized, the City just made up its "procedure" as it went along (App., pp. 149 [trial court], 102 [court of appeal], 50 [supreme court]) – in a manner that extended each year's process beyond the end of the year for which the rent increase had been sought. Thus, the 1988 increase was not denied until 1989 (App., p. 93), while the 1989 and 1990 increases were severely reduced in a consolidated city council hearing in 1992 (App., pp. 96, 101). Certified records (necessary for judicial review) were not compiled by the City until the middle of 1993. The "bungling" was thus compounded by foot-dragging.

In 1990, the Gallands sued. Incredibly, when confronted in court with the enormous cost their procedures had thrust on the Gallands, City officials argued the Gallands never should have complied with all those requests! This despite the fact that the City denied the Gallands' application because they still hadn't produced enough information. In Clovis, chutzpah knows no bounds.

The Gallands' suit invoked 42 U.S.C. § 1983, claiming that the City's actions had taken their property without compensation and denied their rights to both substantive and procedural due process. The trial court, after hearing extensive evidence, found that no taking had occurred, but that the City had denied the Gallands' procedural and substantive due process in manifold ways. These ranged from failing to provide guidelines for determining how to prove entitlement to rent increases; to making repetitive and arbitrary requests for information having no relation to the legitimate purposes of rent control; to relying on evidence obtained *ex parte*, outside the public hearings; to delaying preparation of the findings, thereby delaying the Gallands' ability to obtain judicial review; and knowingly making the rent review process so time-consuming, expensive, and burdensome that any relief theoretically available was illusory. (App., pp. 149-150.) The trial court granted a writ of mandate, vacated the City's decisions (App., p. 140), and awarded damages for violation of substantive due process in the total amount of $1,019,261.50, which included lost rents, unnecessary administrative costs, and attorneys' fees. (App., p. 140.)

The Court of Appeal affirmed. Noting that a citizen's right to due process of law mandates timely notice and meaningful opportunity to be heard, as well as a substantive element that forbids arbitrary treatment apart from the procedures, the appellate court agreed with the trial court that the city's actions violated both branches of due process. (App., p. 85.) The Court of Appeal also agreed with the trial court that, under cases like *Zinermon v. Burch*, 494 U.S. 113, 124 (1990), the Clovis procedures provided no remedy for the Gallands and therefore remanding the matter to the City was as pointless as it would be unconstitutional. *On appeal, the City did not challenge any of the trial court's factual findings.* (App., p. 107.)

The California Supreme Court reversed (App. 1), over two dissents (App., pp. 57, 64). But it didn't just reverse. In this case that was so frightfully marred by the City's *ad hoc*, make-it-up-as-you-go-along "process," the California majority – despite ample evidence of what it understatedly called "bureaucratic bungling" (App., p. 49) – returned the case to the bungling bureaucrats for more of the same.[2]

The articulated basis for this was an earlier decision by a divided California Supreme Court: *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761, 941 P.2d 851 (1997), *cert. den.*, 522 U.S. 1077. In *Kavanau*, the California majority held that, where a municipality had wrongly denied rent increases for a few years, a landlord could not maintain an action for a 5th Amendment taking. Rather, the landlord's sole remedy was to return to the rent control board and seek increased rents for the future to offset the losses in the past.[3]

Here, that rationale was transplanted from takings law to trump due process and civil rights law as well. The

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[2] This Court has seen this sort of thing before from California. In *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, fn. 22 (1981), Justice Brennan (dissenting, but expressing the substantive views of five Justices) explained why the remedy for a regulatory taking *had* to be compensation, by quoting a noted California land use commentator. That commentator had gleefully explained to a gathering of municipal attorneys that the (then) California system that merely remanded a confiscatory ordinance to the city was a good deal for cities. As he put it, "Don't worry about it. . . . [Simply] change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again." Hey, man, it's California.

[3] *Kavanau* contained no hint of the administrative harassment to which the Gallands had been subjected and the Court was plainly skeptical whether Mr. Kavanau had suffered any damage at all (see App., p. 68; *Kavanau*, 16 Cal.4th at 779).

California majority held that the Gallands *could not as a matter of law* pursue a Section 1983 remedy until after they exhausted their administrative remedies by applying to the Rent Control Commission for a so-called "*Kavanau* adjustment" that would be large enough to cover the increased rent for 1988, 1989, and 1990, the administrative costs to which the City had needlessly put the Gallands, and presumably their attorneys' fees and interest on all of the above, to boot. (App., pp. 1-2, 33.)

The California majority left no doubt that it was explicitly creating a state law administrative pre-condition that had to be exhausted before federal Section 1983 remedies could be pursued in state court (see its language quoted *post*, p. 14).

The new California "remedy" requires property owners to jump through the following six (and likely more) state hoops *before* they can invoke their federal Section 1983 remedy. (1) Seek approval of a rent increase from the Rent Control Commission. If dissatisfied, (2) appeal that to the city council.[4] If still dissatisfied, (3) seek a writ of administrative mandate from the superior court to review the city council's decision.[5] If such review determined that the denial of a rent increase was confiscatory, then (4) return to the Rent Control Commission to seek a "*Kavanau* adjustment." If still turned down, then (5) appeal again to the city council.[6] If still dissatisfied, then (6) seek a writ of administrative mandate from the superior court to determine whether the result (even with

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[4] If the city council remands to the rent control commission that, of course, would revert the process back to step one to begin again, adding more administrative steps.

[5] This could, of course, lead to two additional litigational steps in the court of appeal and the state supreme court – a process that consumes years.

[6] See footnote 4.

a *Kavanau* adjustment) is still confiscatory.[7] Only after successful conclusion of this administrative and judicial "remedial" gauntlet, would the property owners be permitted for the first time to (7) pursue, in a *third* lawsuit, a damages remedy under Section 1983 – unless, by that time, they had exhausted not only these state preconditions to suit, but themselves and their bank accounts, as well.[8]

Two Justices dissented on the ground that it was both unfair and unseemly to return the Gallands to the tender mercies of those who had wilfully violated their constitutional rights, and that it also defied clear holdings of this Court (e.g., *Patsy v. Board of Regents*, 457 U.S. 496 [1982]; *Felder v. Casey*, 487 U.S. 131[1988]). (App., pp. 58-59, 65.)

The Gallands' timely Petition for Rehearing was denied (App., p. 162), and this Petition followed.

REASONS FOR GRANTING THE WRIT

I

42 U.S.C. § 1983 IS NOT SUBSERVIENT TO STATE LAW

The California majority based its holding on this flawed premise: state procedure provides *an avenue* for relief; therefore, Section 1983 is not available *ab initio*. (App., p. 1.) That premise is belied by this Court's consistent interpretation and application of Section 1983:

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[7] See footnote 5.

[8] Experts on local planning and regulation have suggested that regulations may become "so Byzantine as to deny due process of law to the participants through the sheer complexity of the system. . . . " (Hagman & Misczynski, Windfalls For Wipeouts 12 [Am. Soc'y of Planning Officials 1978] [quoting Fred Bosselman, a pro-regulation practitioner and law professor and then the dean of the national land use bar].) The new California procedure seems a perfect illustration.

> " . . . 'the dominant characteristic of civil rights actions [is that] *they belong in court.*' [Citation.] 'These causes of action,' we have explained, 'exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance.*' [Citation.]" (*Felder*, 487 U.S. at 148; italics by the Court; underscoring added.)

In *Patsy*, 457 U.S. at 500, this Court settled a brewing lower court controversy when it refused to reconsider its long line of cases holding that states could not interpose administrative remedies to bar or defer Section 1983 actions. It seems that such a clear statement is needed again.

A

The Purpose of Section 1983 Is To Provide Relief Under *Federal* Law, Which May Not Be Conditioned on Exhaustion of State Law Remedies

A Section 1983 case is a "species of tort liability,"[9] a statutorily created "constitutional tort"[10] that sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely federal remedy"[11] with "broad and sweeping protection"[12] "read against the background of tort liability that makes a man responsible for the natural

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[9] *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

[10] *Jefferson v. City of Tarrant*, 522 U.S. 75, 78-79 (1997); *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

[11] *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

[12] *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) [quoting with approval].

consequences of his actions"[13] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[14] While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader " than tort law,[15] and must be broadly and liberally construed to achieve its goals.[16] "[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors."[17]

A Congressional grant of state jurisdiction to enforce a federal law creates the *duty* to exercise it. (E.g., *Testa v. Katt*, 330 U.S. 386, 393 [1947].) When Section 1983 is being enforced in a state court, it must be accorded the same broad sweep it would receive in federal court (*Felder*, 487 U.S. at 139), and exhaustion of state administrative remedies may not be required (*Patsy*, 457 U.S. at 500). The California majority's conclusion that there is no such duty, and that state law can take precedence over this aspect of Section 1983 jurisprudence, is yet another instance of California interpreting federal law incorrectly. (See *post*, pp. 22-29, and compare this Court's comments about California's 5th Amendment errors in *Nollan v. California Coastal Commn.*, 483 U.S. 825, 839 [1987], and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 [1987].)

The California majority glosses over the fact that there are two distinct injuries here: (a) confiscatorily

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[13] *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part, to expand government liability, in *Monell*, 436 U.S. 658.

[14] *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

[15] *Kalina v. Fletcher*, 522 U.S. 118, 124-125 (1997).

[16] *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

[17] *Felder v. Casey*, 487 U.S. 131, 141 (1988).

inadequate rents, and (b) a rent adjustment "process" that can be characterized as the joint handiwork of Rube Goldberg and Franz Kafka. By focusing on the former, the California majority overlooks the injury inflicted by the latter. However, the process cooked up by the City was a never-ending nightmare for the Gallands. The proceedings were so drawn out and delayed that, by themselves, they caused serious personal and financial harm.

"A violation of [§ 1983] is an injury to the individual rights of the person. . . . Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." (*Wilson v. Garcia*, 471 U.S. 261, 277 [1985].)[18] Thus, when the trial court awarded damages to the Gallands, it was providing compensation both for injuries done to them as individuals by the City's overreaching and abusive process, as well as for the City's refusal to permit them a reasonable return on their investment.[19]

Unless Congress has expressly forbidden the use of Section 1983, the courts enforce it. (E.g., *Golden State Transit*, 493 U.S. at 105-197.) No such prohibition is applicable here, and therefore Section 1983 should have been applied to these facts.

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[18] See *McCulloch v. Glasgow*, 620 F.2d 47 (5th Cir. 1980), awarding compensation not only for the taking of private property, but also (under Section 1983) for harm to the person of the plaintiff, who suffered a heart attack during the process.

[19] As Justice Holmes put it for this Court, "[The Constitution] deals with persons, not with tracts of land." (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) And as Justice Stewart reiterated more recently: "Property does not have rights. People have rights." (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 [1972].) When their rights in property are damaged, they are entitled to compensation.

Nor is Section 1983 confined to any rigid structure:

> "Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. . . . [T]he principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." (*Owen v. City of Independence*, 445 U.S. 622, 657 [1980].)

Here, the "principle of equitable loss-spreading" is singularly appropriate. The trial court properly placed the responsibility for the City's own malfeasance on the City as a whole. (See *Armstrong v. United States*, 364 U.S. 40, 49 [1960].) But the California majority placed the burden of confiscatory past rental rates, along with the costs associated solely with the City's "bureaucratic bungling," on present and future tenants (App., p. 49.) Why should the tenants pay for the City's bungling? How does that provide any incentive for the City to mend its ways? After all, as this Court has held, one of the reasons for Section 1983 compensation is "to serve as a deterrent against future constitutional deprivations," and to "encourage" development of policies that will prevent future violations. (*Owen*, 445 U.S. at 651-652.) California, however, has now removed that deterrent factor and, perforce, any incentive to change unconstitutional municipal behavior. In fact, it rewards municipal lawlessness by allowing the City to walk away scot-free while sticking the tenants with the burden of paying for the City's constitutional malfeasance.[20]

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[20] Of course, if the market won't tolerate such a large increase (i.e., if tenants would prefer to move rather than pay), then the Gallands would be stuck with the bill. Either way, the City gets a free ride.

B

Nothing in California Law Can Undercut Or Defer the Federal Remedies Provided By Section 1983

The California majority has now concocted a remedy that is worse than the disease. It sends the City's victims right back to the same "bungling bureaucrats" who caused the problem. That this was intended to place state law conditions on the use of Section 1983 is beyond question; the opinion below is clear:

> **"Accordingly, when landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) *that relief via a writ of mandate and a Kavanau adjustment is inadequate.*"** (App., p. 30; emphasis added.)

Thus, the California majority has *expressly* subordinated the availability of Section 1983 relief to exhaustion of a complex state remedial procedure (described *ante*, p. 8). In short, California has *de facto* barred access to federal law that, ironically, was enacted to allow constitutionally aggrieved citizens to bypass obstructionist state procedures and secure expeditious vindication of their *federal* constitutional rights. (E.g., *Felder*, 487 U.S. at 138, 153; *Patsy*, 457 U.S. at 503-505.)

This Court's jurisprudence is strongly contrary:

> "The question before us today, therefore, is essentially one of pre-emption: is the application of the State's notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead ' "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" '? [Citation.] Under the Supremacy Clause of the Federal Constitution, '*[t]he relative importance to the State of its own law*

> *is not material* when there is a conflict with a valid federal law,' 'for *any state law, however clearly within a State's acknowledged power* which interferes with or is contrary to federal law, *must yield*.' [Citation.]" (*Felder*, 487 U.S. at 138; emphasis added.)

Thus, here, the purpose of California's new procedure is the same as that struck down in *Felder*: to place state administrative hurdles in the path of Section 1983 plaintiffs, with the intent of allowing municipalities to continue the process in ways designed to diminish any risk to the municipal fisc. The purpose of Section 1983, however, is wholly at odds with such an approach:

> "[T]he *central purpose* of the Reconstruction-Era laws is to *provide compensatory relief* to those deprived of their federal rights by state actors." (*Felder*, 487 U.S. at 141; emphasis added.)

Section 1983 was intended by Congress to expose municipalities and local officials to "a new form of liability." (*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 [1981].) "[H]owever understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation. . . . " (*Felder*, 487 U.S. at 143.)[21]

Section 1983's "central purpose" of providing "compensatory relief" was wholly undercut by denying the Gallands the ability to seek compensation for the losses

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[21] Careful examination of government actions "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." (*United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993].) See also *United States v. Winstar Corp.*, 518 U.S. 839, 135 L.Ed.2d 964, 1005 (1996) [" . . . statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."]

inflicted on them by the City's constitutional misfeasance, and forcing them instead to go hat-in-hand to the municipal officials who wronged them in the first place – like a latter-day Oliver Twist asking his tormentors for more gruel.

Federal jurisprudence long ago settled the overriding nature of Section 1983:

> "While it may be completely appropriate for California to condition rights which grow out of local law . . . , California may not impair federally created rights or impose conditions upon them." (*Willis v. Reddin*, 418 F.2d 702, 704 [9th Cir. 1969].)
>
> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and seasonably made, is not to be defeated under the name of local practice." (*Davis v. Wechsler*, 263 U.S. 22, 24 [1923] [Holmes, J.].)

Section 1983 was designed to provide a prompt, *independent* federal remedy with real compensatory redress. That has now been taken from Californians.

Recently, this Court inadvertently may have injected some uncertainty into this settled field. In *Lujan v. G & G Fire Sprinklers, Inc.*, ___ U.S. ___, 149 L.Ed.2d 391 (2001), this Court rejected a Section 1983 challenge to a California statute authorizing government agencies to withhold payment from their contractors who failed to comply with prevailing wage laws. The Court concluded that a statutory breach of contract action would satisfy due process.

In holding that a state law process could render a Section 1983 suit unnecessary in those circumstances, it is doubtful that this Court intended *sub silentio* to undo the decades of settled law described above. First, *Lujan* mentions none of those landmark cases. Second, a review of

the briefs filed in this Court in *Lujan* reveals that none of the parties thought to call this line of cases to the Court's attention, so it is not surprising that it was not addressed in the opinion. Third, *Lujan* dealt with procedural – rather than substantive – due process, and this Court has frequently deferred to state process when (unlike here) it is adequate. Indeed, the process here was so palpably inadequate that even the California majority conceded that "[t]he Gallands lacked a timely and affordable means by which to seek rent increases." (App., p. 50.) Fourth, stripped to its core, *Lujan* was substantively a state suit for breach of contract, and the plaintiff had no vested protected right. Here, by contrast, the Gallands had an existing property right in their mobile home park, and the constitutional right to regulations that would permit a reasonable return on their investment.[22] Fifth, *Lujan* involved a facial challenge to a clearly defined statutory procedure. But where, as here, the gravamen of the action is a "process" that even the California majority described as "shifting," "costly," "inefficient," "ad hoc," "ill-considered," "bungling," and "unjustified" (App., pp. 49, 50) – the *Lujan* analysis cannot apply.

It thus might be appropriate for the Court to reaffirm its commitment to its settled Section 1983 jurisprudence, and to make clear that *Lujan* is a narrow decision dealing with the facial constitutionality of a clear regulatory scheme with a real remedy, and not a broad shift in Section 1983 jurisprudence. Such clarification would seem to be another benefit of a decision on the merits in this case, as it would spare the lower courts and countless parties needless confusion and litigation.

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[22] Under California law, the right to receive rent is property. (*People, etc. v. Lynbar, Inc.*, 253 Cal.App.2d 870, 875, fn. 2 [1967].)

II

THERE IS A NEED FOR A DUE PROCESS REMEDY AGAINST GOVERNMENT REGULATORY ACTIONS THAT ARE ARBITRARY AND IRRATIONAL. THE "ALL OR NOTHING" TAKINGS CLAUSE APPROACH SOMETIMES LEAVES PROPERTY OWNERS SERIOUSLY DAMAGED BY ARBITRARY AND CAPRICIOUS MUNICIPAL ACTIONS WITH NO REMEDY AT ALL

The concept of substantive due process has been applied in land use cases for generations to guard against municipal actions that are arbitrary and capricious. (E.g., *Nectow v. City of Cambridge*, 277 U.S. 183 [1928]; *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 124 [3d Cir. 2000]; *Herrington v. County of Sonoma*, 834 F.2d 1488, modified 857 F.2d 567 [9th Cir. 1987].)[23] As recovery for such a violation requires proof of arbitrary conduct resulting in damages, but not the complete destruction of the property's use or value (*Bateson v. Geisse*, 857 F.2d 1300, 1303 [9th Cir. 1988]), substantive due process is an appropriate claim for seriously damaged property owners.

Some lower courts, however, have misused this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989) to create a rule that all claims by property owners against government regulators must be subsumed within the 5th Amendment's Takings Clause, not the guarantee of due process of law, even when the gravamen of the complaint has to do with process, and not with a total deprivation of use. (See, e.g., *Sinclair Oil Co. v. County of Santa Barbara*, 96 F.3d 401 [9th Cir. 1996], *cert. den.*, 118 S.Ct. 1386.)

The decision below, while paying lip service to the possibility of a due process remedy, has *de facto* written it out of California law. It treated this case as the equivalent

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[23] On the utility of due process analysis, see *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 [Kennedy, J., concurring], 554 [Breyer, J., dissenting] (1998).

of *Kavanau*, a takings case (App., p. 27), and then accorded the Gallands the same non-relief given Mr. Kavanau. The Byzantine process it created as a precondition puts Section 1983 beyond the reach of most Californians, who lack the King's ransoms necessary to pursue this sort of interminable, multi-stage litigation.

The Gallands sued on both takings and due process theories. The trial court rejected the takings theory. They had not, after all, been denied all economically productive use of their property; it was still functioning as a mobile home park. However, they had been repeatedly and arbitrarily denied the ability to charge rents adequate to provide a reasonable return on their investment, and had been forced through a slow-motion bureaucratic meat grinder as their penalty for having the temerity to seek a modest increase that did not even keep pace with inflation. Thus, the trial court rightly found both substantive and procedural due process violations. That was in keeping with what this Court has acknowledged as:

> " . . . our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Reno v. Flores*, 507 U.S. 292, 302 [1993].)

Plainly, the *ad hoc* system created by the City's "bureaucratic bungling" cannot satisfy any definition of "tailored," or of "compelling state interest."

To justify reversal, the California majority eschewed the standard of arbitrary, capricious, or irrational conduct that is generally applied in cases of this kind (e.g., *Bateson*, 875 F.2d at 1303; *Woodwind Estates*, 205 F.3d at 124) and decided that the Gallands could not recover unless they demonstrated a "deliberate flouting of the law" by the Clovis officials. (App., p. 45.) Although the

Gallands believe the evidence met this standard, it seems an unnecessarily high one to demand from people as mistreated as they were. In any event, use of that standard plainly conflicts with cases like those cited above, demonstrating the need for this Court's ministrations to settle the standard.

The distinction between takings and due process was carefully explained recently by Justice Breyer:

> " . . . at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate governmental action that takes 'private property' to serve the 'public' good." (*Eastern Enterprises v. Apfel*, 524 U.S. 498, 554 [1998] [Breyer, J., dissenting].)

One frustrated trial judge explained what he called the "all-or-nothing" approach of takings litigation this way:

> "If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead." (*Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 23-24 [1999].)

Thus, as in this case, there are instances in which regulatory action is so arbitrary, and so severe in its impact, that it violates the constitutional rights of property owners, even though it falls somewhat short of a taking. It is necessary to provide a vehicle that will enable property owners to invoke their due process protection. One would think that Congress did so in Section 1983. However, the California majority, in a ploy reminiscent of

the discredited "interposition" doctrine of yore (see *Cooper v. Aaron*, 358 U.S. 1 [1958]) has snatched it from their hands. In its place, the court below has interposed a state "remedy" between federal law and California citizens. That stands Section 1983 jurisprudence on its head, as Congress intended to interpose that statute between citizens and local government. (*Mitchum*, 407 U.S. at 243.) Moreover, returning the victims to the tender mercies of the very bureaucrats who violated their rights in the first place is a "remedy" that this Court specifically rejected:

> "In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that *directs injured persons to seek redress in the first instance from the very targets of the federal legislation*, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court." (*Felder*, 487 U.S. at 153; emphasis added.)

As a noted treatise put it recently, this Court's recent decisions demonstrate "the need for meaningful substantive due process." (Eagle, Regulatory Takings, § 12-2 at 977 [2d ed. 2001].) Professor Eagle singled out California rent control decisions as a basis for this need. (Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1031 [2000].) Beyond that, when substantive due process is violated, there needs to be a compensatory mechanism. Congress thought it supplied one in Section 1983. Without this Court's intervention, however, that remedy will be lost to Californians.

III

FOR THE PAST TWENTY YEARS, CALIFORNIA HAS CONSISTENTLY DENIED 5TH AMENDMENT PROTECTION TO ITS PROPERTY OWNERS AND NOW HAS DEFIED THIS COURT'S DUE PROCESS HOLDINGS AS WELL. IT IS TIME TO CALL A HALT TO THIS MAVERICK JURISPRUDENCE

A

The Legal Climate in California Has Become Openly Hostile to the Constitutional Rights of Property Owners

This Court's repeated holdings notwithstanding, California insists on marching to the beat of its own, unique 5th/14th Amendment drummer. California holdings have become the subject of a drumbeat of criticism and, at times, derision by distinguished commentators *on both sides of the issue.* They have called California's attitude toward property owners "more hostile . . . than any other high court in the nation."[24] They concluded that California's attitude was "extreme,"[25] "onerous [and] draconian"[26] – in short, "the most restrictive state in the

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[24] DiMento, *et al., Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras,* 27 U.C.L.A.L. Rev. 859, 872 (1980). The eight highly knowledgeable authors were led by the late UCLA law professor Donald G. Hagman, the leading land use legal thinker and analyst of his time, and noted for his balanced position.

[25] Fischel, Regulatory Takings: Law, Economics, and Politics 226 (Harvard U. Press 1995). The author is a nationally recognized land economics professor at Dartmouth.

[26] Callies, *The Taking Issue Revisited, 37 Land Use Law & Zoning Digest* 6, 7 (July 1985). The author, a professor of law at the University of Hawaii, co-wrote one of the most influential books on land use – with an unequivocally pro-regulation

country with respect to land use."[27] Commentators sympathetic to government regulators agree that California's courts have applied this anti-property owner bias "consistently," and that it "pervades the body of California zoning law generally."[28]

In 1987, this Court responded to California's idiosyncratic interpretation of the 5th Amendment by reversing two California decisions during a two-week span and noting how out of touch the California courts had become:

> "Our conclusion on this point is consistent with the approach taken by *every other court that has considered the question, with the exception of the California state courts.* [Citing numerous cases from other state and federal courts.]" (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 839 [1987]; emphasis added.)

This Court also plainly told California that it had not been following the 5th Amendment:

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orientation. (See Bosselman, Callies, & Banta, The Taking Issue [Council on Environmental Quality 1973].)

[27] Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 Rutgers L.J. 15, 70 (1983). The author has seen both sides of the issue, having served, at different times, as litigation counsel to the National Association of Home Builders and as Chairman of the Maryland-National Capital Park and Planning Commission (regulating land use in Montgomery County, Md.).

[28] 1 Williams, American Land Planning Law § 6.03 at 184 (rev. 1988, supp. 2000). Others openly gloated. See Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO Municipal L. Rev. 192-193 (1975), quoted with disapproval in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, fn. 22 (1981) (Brennan, J., dissenting, but expressing the substantive views of five Justices).

> " . . . the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 [1987].)

Over a decade later, nothing has changed;[29] this Court's admonition notwithstanding, Californians' property rights remain very much a constitutional "poor relation." (Compare *Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].) A poll of land use experts on both sides of the issue found "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities . . . are accustomed to meeting little resistance from the state courts."[30] Two knowledgeable commentators concluded that, "[i]n California, the courts have elevated governmental arrogance to a fine art."[31] And so they have, the case at bench being the quintessential "Exhibit A." Only a high level of arrogance could lead government officials to believe they were treating Mr.

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[29] After the recent decision in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), in which this Court affirmed decisions that the city had acted unconstitutionally when it denied development permission – leading to a seven figure award of compensation – the city's attorney refused to accept this judicial condemnation of his client's actions. When asked how the city would change in response to this Court's ruling, he replied: "Will it change anything? No. " (Belcamino, "Monterey loses long court battle," Monterey County Herald, May 25, 1999, p. A. 10.)

[30] Coyle, Property Rights and the Constitution 11 (State U. of N.Y. Press 1993).

[31] Babcock & Siemon, The Zoning Game Revisited 263 (Lincoln Inst. of Land Policy 1985). The late Richard Babcock was, at the time, the recognized dean of the Nation's land use bar and – significantly – a vigorous defender of expansive government regulatory control.

and Mrs. Galland fairly – or at least to believe they could get away with it.

B

California's Maverick Land Use Decisions Have Been Consuming an Inordinate Part of This Court's Scarce Resources – As Much As All Other Jurisdictions Combined. It's Time to Align California's Jurisprudence With the Rest of the Nation

The upshot of "elevat[ing] governmental arrogance to a fine art" is that California regulators do as they please.[32] That inspires litigation to vindicate the owners' constitutional rights. A review of this Court's docket since 1978, when the modern era of constitutional land use jurisprudence began, reveals this startling fact: **land use cases arising in California account for as many of this Court's decisions in this field as those from all other jurisdictions combined.** Many of the household names in 5th Amendment law arose in California.[33]

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[32] As Professor Coyle observed: " . . . the basic message of the [California Supreme] court was 'Do what you want.' " (Coyle, *supra*, fn. 30, p. 156.)

[33] *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 827 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Ehrlich v. Culver City*, 512 U.S. 1231 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

When the eleven cases this Court decided from California are compared to the eleven land use cases arising in *all other jurisdictions combined*,[34] it is apparent that something is alarmingly amiss in California. One state – no matter how large and populous – should not account for as many cases in this Court as all sixty-two other jurisdictions.[35] And this Court alone knows how many unsuccessful petitions have been filed seeking review of additional California decisions.

There should be no mistaking the jurisprudential rebellion that has occurred on the west coast in property regulation cases. A majority of the California Supreme Court has performed the intellectual equivalent of firing on Fort Sumter, as it were. Californians have been waiting for the Fort to fire back. It is time to tell California that it is, after all, a part of the Union.

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[34] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264 (1981); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Preseault v. I.C.C.*, 494 U.S. 1 (1990); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997); *Palazzolo v. Rhode Island*, no. 99-2047 [argued Feb. 26, 2001, but not decided at this printing].

[35] This figure is the sum of the other 49 states plus the 13 federal circuits.

C

In The Case at Bench, California Has Expanded Its Idiosyncratic Takings Jurisprudence To Undermine Property Owners' Rights to Due Process of Law, As Well. In The Process, California Has Subordinated The Civil Rights Act (42 U.S.C. § 1983) to Its State Law, Thus Defying Generations of This Court's Decisions

Justice Janice Rogers Brown, a regular dissenter from California's abuse of property owners,[36] put this case in context by noting the defiance of federal law flowing from the California majority's requirement of exhaustion of state administrative and judicial remedies invoking Section 1983. She then rightly concluded that:

> "This conclusion directly contravenes *Patsy v. Florida Board of Regents* (1982) 457 U.S. 496 (*Patsy*), an inconsistency that is only explainable in terms of the reduced importance the majority gives to the constitutional interest that is at stake. Thus, in the latest of a series of decisions rejecting the claims of property owners, this court now refuses to enforce federal civil rights remedies when it comes to confiscatory regulations. I respectfully dissent." (App., p. 65.)

As it has done in takings litigation, the California majority played word games in its effort to evade constitutional demands. What this case involves is simple

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[36] See *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006, 1043 (1998) (Brown, J., dissenting); *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 1024 (1999) (Brown, J., dissenting). Others, though never a majority, have joined her in protesting California's defiance of this Court's jurisprudence (as Justice pro tem. Barbara J.R. Jones did in this case [App., p. 57]). See *Santa Monica Beach*, 19 Cal.4th at 983 (Baxter, J., dissenting); *Landgate*, 17 Cal.4th at 1034 (Chin, J., dissenting); *Kavanau*, 16 Cal.4th at 792 (Baxter, J., dissenting).

requests for modest rent increases – amounting to pennies per day for each unit – for the years 1988, 1989, and 1990. It is now 2001 and, as their "remedy," the Gallands have just been sent back for some more "bureaucratic bungling." The California majority decided that no substantive due process claim could *yet* have accrued because, under the procedure newly concocted in this case, the Gallands can return to the Clovis Rent Control Commission and ask for yet another rent increase – this time, one that is large enough to cover not merely the three years in question, but interest for more than a decade, plus the costs to which the Gallands were needlessly put by the City's "shifting, costly, and at times ill-considered" (App., p. 50) demands, including their attorneys' fees.

Until the Gallands do that, held the California majority, no due process claim can even arise. So much for Section 1983 and for the federal Supremacy Clause.

With all the respect due it, that's a shell game, not legal analysis. It also conflicts with *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), where this Court plainly held that a substantive due process claim is actionable under Section 1983 "when the wrongful action is taken." Here, the wrongful action was the City's insistence on imposing confiscatory rents, which was exacerbated by the City's imposition of absurdly burdensome procedural requirements.

This is the same game that the California majority has recently played in takings litigation. In *Landgate v. California Coastal Commn.*, 17 Cal.4th 1006 (1997), *cert. den.*, 525 U.S. 876 (1998), the Commission had denied the use of property in a manner that it had no jurisdiction to do. When the landowner successfully proved the lawlessness of the Commission's acts, and sought compensation for the period of time during which its illegal action had rendered the land useless, the California majority responded that *the land use "planning process" continues*

throughout the litigation that follows the actual finality of planning. Thus, under the California majority's reasoning, no claim for a temporary taking could arise until after all "planning" (including litigation) is concluded.[37] Only then may the aggrieved property owner, compelled to litigate for years to complete the "planning process," seek relief by way of – what else? – more litigation. Respectfully, that isn't law; it is farce.

This game of interminably delaying the accrual of a claim until it is too late to do any good, what Justice Brown called "a formidable example of judicial sleight of hand" (App., p. 70), has now been applied by the California majority to disable landowners from pursuing either a 5th or a 14th Amendment claim for relief under either a takings theory or a due process theory. That runs roughshod over long and well settled law laid down by this Court and denies Californians protection Congress intended through Section 1983.

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[37] That is not only contrary to common sense, it is contrary to a host of decisions in other states. See, e.g., *Eberle v. Dane County Bd. of Adjustment*, 595 N.W.2d 730 (Wis. 1999); *Cumberland Farms, Inc. v. Town of Groton*, 719 A.2d 465 (Conn. 1998); *Woodland Manor III Associates v. Keeney*, 713 A.2d 806 (R.I. 1998); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994); *Alexander v. Town of Jupiter*, 640 So. 2d 79 (Fla. App. 1994). In each of these cases, the courts held that a taking claim is ripe when administrative proceedings have concluded and a final administrative decision has been made. As the Connecticut Supreme Court put it, "It is unnecessary for the plaintiff to await *judicial review* of the administrative action" because, as this Court held in *First English*, 482 U.S. at 322, invalidation of the regulatory action would not suffice to provide the constitutionally mandated compensation. (*Cumberland Farms*, 719 A.2d at 474; emphasis in original.) The Wisconsin Supreme Court expressly refused to follow California because *Landgate* is contrary to this Court's decision in *First English*. (*Eberle*, 595 N.W.2d at 742, fn. 25.)

CONCLUSION

The California Supreme Court has now done for 14th Amendment due process what it has already accomplished for 5th Amendment takings: eliminated it as a viable constitutional claim for property owners in California courts. In the process, it has also *de facto* eliminated California as a viable forum for property owners seeking vindication of federal constitutional rights in Section 1983 litigation.

The benefit of this Court's "black letter law" involving takings, due process, and civil rights is being withheld from California's property owners. They are no less entitled to constitutional protection by this Court than citizens in other states – and far more in need of it.

However, as long as this Court remains silent, California's defiance will continue. The integrity of this Court's holdings deserves better. The Constitution deserves better. Some members of this Court have begun to recognize California's actions for what they are. (*Lambert v. San Francisco*, 120 S.Ct. 1549, 1551 [2000] [Scalia, J., with Kennedy and Thomas, JJ., dissenting from denial of certiorari].)

Roger and Virginia Galland pray that certiorari be granted, that California's rules be brought in line with this Court's settled jurisprudence, and that the judgment properly entered by the trial court be ordered reinstated.

Respectfully submitted,

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IN THE SUPREME COURT OF CALIFORNIA

ROGER GALLAND et al., Plaintiffs and Respondents, v. CITY OF CLOVIS et al., Defendants and Appellants.	S080670 Ct.App. 5 F025257 Fresno County Super. Ct. No. 418831-4 (Filed Feb. 5, 2001)

In *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 782-786 (*Kavanau*), we decided that under rent control, adjustment of future rents was generally sufficient to compensate for prior rent ceilings that were set so low as to be confiscatory, and that such adjustments precluded a claim for inverse condemnation. We left open the question, however, whether a future rent adjustment, which we will refer to as a *Kavanau* adjustment, also forecloses a suit for damages for violation of a right to constitutional due process (U.S. Const., 5th & 14th Amends.) under 42 United States Code section 1983 (hereafter section 1983).[1] We address that question here and conclude that a *Kavanau* adjustment would preclude section 1983 damages if it is adequate to prevent constitutional injury by compensating for previous excessively

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[1] Section 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

low rent ceilings. As in *Kavanau*, we further conclude that this matter must be remanded to the government agency responsible for setting rent ceilings to attempt to formulate an adequate *Kavanau* adjustment, subject to judicial review. In the present case, the trial court did not have the benefit of our *Kavanau* decision, and the Court of Appeal misapplied that decision in concluding that a *Kavanau* adjustment was not available as a matter of law. We further explain that the trial court appears to have made some fundamental errors in determining whether and to what extent the rent ceilings imposed in this case were confiscatory.

We further consider whether unreasonable costs, in the form of administrative and attorney fees, imposed on landlords seeking rent increases, may themselves be the basis of a section 1983 claim. We conclude that they may if either of two conditions is present: (1) the costs imposed are part of a government effort to deliberately flout established law, e.g., deliberately obstruct legitimate rent increases; or (2) the landlord suffers confiscation as a result of the imposition of such costs. Because the trial court's method of determining and calculating damages for this type of injury, affirmed by the Court of Appeal, was incorrect, the matter should be remanded to the trial court for reconsideration.

Background: The Mobilehome Owner/Mobilehome Park Owner Relationship

This case concerns the application of a mobilehome rent control ordinance, and some background on the unique situation of the mobilehome owner in his or her

relationship to the mobilehome park owner may be useful. "The term 'mobile home' is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved. [Citation.] A mobile home owner typically rents a plot of land, called a 'pad,' from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located." (*Yee v. Escondido* (1992) 503 U.S. 519, 523.)

Thus, unlike the usual tenant, the mobilehome owner generally makes a substantial investment in the home and its appurtenances – typically a greater investment in his or her space than the mobilehome park owner. (See Baar, *The Right to Sell the "Im"mobile Manufactured Home in Its Rent-controlled Space in the "Im"mobile Home Park: Valid Regulation or Unconstitutional Taking?* (1992) 24 Urb. Law. 157, 158, fn. 13.) The immobility of the mobilehome, the investment of the mobilehome owner, and restriction on mobilehome spaces, has sometimes led to what has been perceived as an economic imbalance of power in favor of mobilehome park owners (*id.* at pp. 170-182) that has in turn led many California cities to adopt mobilehome rent

control ordinances (see *id.* at p. 182 [some 70 cities in California had adopted rent control as of 1992]).

I. Statement of Facts

Because facts in their complexity are integral to an understanding of this case, we recite those facts in considerable detail.[2] Clovis's Mobile Home Rent Review and Stabilization Ordinance (Clovis Mun. Code, ch. 13, § 5-13.01 et seq. enacted in 1978 and repealed in 1993 (Ordinance)), was one such ordinance. Its intended purpose was to protect mobilehome owners from unreasonable rent increases while recognizing the need of mobilehome park owners to receive rent increases sufficient to cover increased costs and to generate a fair return on their investment (ROI). (Ord., § 5-13.01.) The Ordinance provided that on the filing of a petition signed by more than 50 percent of the mobilehome owners within a mobilehome park, the Clovis Mobile Home Rent Review Commission (Commission) would review the rent increase and determine whether it was "so great as to be an unreasonable increase." (Ord., § 5-13.06(b).) The park owner had the burden to prove by a preponderance of the evidence that the rent increase was reasonable in light of the nonexclusive cost factors enumerated in Ordinance section 5-13.06(i). Those factors included utility rates, property taxes, insurance, advertising, cost-of-living increases attributable to incidental services, repairs and maintenance, capital improvements, amenity and service upgrades, fair rate of ROI, and increased property values.

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[2] Much of the material in this part of the opinion is taken from the Court of Appeal's statement of facts.

The Ordinance provided that Commission decisions could be appealed to the Clovis City Council within 15 days after the final written decision was mailed to the parties.

The Gallands purchased the Woods Mobile Country Club (the Woods or park), a 260-space park, in 1978. The Gallands hired Planned Management Services (PMS), a Utah corporation in which they owned an interest, and which manages mobilehome parks in a number of states, to manage the Woods. John Chamberlain, the president of PMS, has managed the Woods and acted as the Gallands' representative in the rent review proceedings since 1978.

In 1983, the Gallands challenged the constitutionality of the Ordinance and a decision by the Commission permitting only a portion of a noticed rent increase. The Court of Appeal upheld the constitutionality of the Ordinance and the Commission's rent decision.

In 1985, the Gallands (by PMS and Chamberlain) challenged a Commission decision permitting less than the noticed rent increase. The trial court rejected their challenge, and the Court of Appeal affirmed in an unpublished opinion, in which the court faulted PMS for failing to present any factual evidence in support of its requested rent increase. The court also sanctioned PMS for a frivolous appeal.

A. The Challenged Rent Review Proceedings

1. 1988 Rent Increase

The Gallands noticed a $6 a space rent increase effective April 1, 1988, which raised the monthly rent to $275.

The mobilehome owners petitioned the Commission to review the matter. Chamberlain asked what materials and information the Commission would like produced and submitted a letter stating that the rent increase was less than half the increase in the consumer price index (CPI). Park expenses had increased $46,000 in the preceding year, and cash flow in constant dollars had fallen $10,275 since 1986 and $30,000 since 1984. Ray Wyland, the president of the Woods tenant association, responded that the CPI included increases for items other than housing, Mr. Chamberlain had not specified which expenses had increased, and the Woods rent had increased from $143 in 1979 to $269 in 1987.

In response, the Commission requested that Mr. Chamberlain provide a copy of the CPI and documentation demonstrating their increased expenses and decreased cash flow.

Mr. Chamberlain submitted several applicable CPI's and prepared tables that provided a breakdown of expenses and set forth the Woods' receipts, disbursements and pre-tax cash flows for 1984 through 1987. The tables showed that expenses had increased more than income, resulting in a diminution of cash flows by $30,000 to $35,000, measured in constant 1978 dollars. Mr. Chamberlain also prepared a table showing the Gallands' ROI for 1984 through 1987.

The Commission heard the matter on April 13, 1988. In addition to hearing from Chamberlain, the Gallands' certified public accountant, Richard Miranda, testified that regardless of the CPI used, cash flows had decreased over the last four years. During that period, income had

increased 10.8 percent while expenses had increased 18.3 percent. The mobilehome owner representative argued the rent should not be increased because the Woods rent was already one of the highest in Fresno County. He submitted the result of a random survey of 12 mobilehome parks in the area that showed the Woods to be charging $75-$100 above every other park surveyed except one, and $50 above that park. He also challenged the Woods' operating expenses as inflated.

The matter was continued with the consent of the parties to April 29, 1988, to provide the commissioners additional time to digest the materials presented. In the interim, the Commission asked the Gallands to provide substantial additional information by April 26, 1988. That information included further breakdowns and explanations for various expenditures, information on vacancies and cash flow for the prior nine years, and additional information and calculations related to ROI including the value of the park when purchased. Mr. Chamberlain provided much but not all of the information requested. He felt that some of the requested information was irrelevant and that other materials could not be gathered in the short amount of time provided.

At the completion of the continued hearing on April 29, 1988, the Commission voted three to two against the requested increase. In its draft findings, the Commission determined that as "a matter of common knowledge and experience," certificates of deposit were earning a pretax return of between 7 and 8 percent, whereas the Woods, according to documents provided by PMS, was earning between 11.2 percent and 14.62 percent, depending on which CPI was used. The Commission determined that

PMS had presented "no credible evidence, by opinion or otherwise, that this difference in yield is unacceptable, . . . unfair or insufficient to attract capital investment for this type of property."

The Gallands objected to the decision on various grounds, including that the Commission had relied on information not presented at the hearing. On May 20, the commissioners reiterated their decision that no increase was warranted. They justified the decision, in part, on a portion of Chamberlain's testimony in the 1985 rent review proceedings regarding fair ROI, which they interpreted to support their conclusion that the current rent provided a fair ROI. The Commission had not notified the parties it would consider evidence from earlier proceedings. The Commission issued its final decision on June 3, 1988, finding three to two that the Gallands had not demonstrated by a preponderance of the evidence that any rent increase was justified.

The Gallands appealed the decision to the city council, which set the matter for hearing on July 18, 1988. The Gallands challenged the Commission's findings and decision, in particular its determination of a fair ROI, as well as the fairness of the proceedings. After hearing from both parties, the city council decided the Gallands had not provided sufficient information to enable the council or the Commission to make an intelligent decision regarding a fair ROI for the Woods. The council remanded the matter to the Commission for further proceedings and ordered the Gallands to provide extensive accounting materials and financial documents which the Commission would consider in determining a fair rate of return.

The information requested included audited financial statements for the preceding 10 years showing assets, liabilities, the Gallands' equity, the ratio of debt to equity and the results of operations; and highs, lows, averages and ranges of the rates of ROI for each of the other mobilehome parks managed by PMS since 1978. The council also instructed the parties that any adjustment for inflation should be based on the U.S. Shelter Index.

The Gallands objected to producing some of the information requested because of the time and expense involved. A 10-year audit would cost approximately $75,000 and would take two to three months to complete. Chamberlain and the mobilehome owners' attorney met with Clovis officials and reached a compromise regarding the additional materials to be presented, no longer requiring audits, but instead permitting PMS to submit data from "the best available existing financial records."

On October 17, 1988, the Gallands submitted extensive materials in response to the council's order. The submissions included information in narrative and table format from 16 other mobilehome parks that PMS managed. The data indicated that the average ROI in constant dollars for the parks was 21.7 percent compared to the Woods' average of 11.9 percent. Regarding vacancy rates over the past 10 years, the Woods averaged a 2.1 percent vacancy rate while other mobilehome parks in Fresno and Clovis averaged a 5.03 percent rate. Regarding fair ROI on the Woods and similar investments, the Gallands submitted a 19-page discussion of various types of investments, their attendant risks and their expected return.

The Gallands also submitted a declaration from Chapman Findlay, Ph.D., former chairman of the Department of Finance and Business Economics at the University of Southern California, providing an opinion regarding the fair ROI for the Woods. He compared the expected return for various types of investments and, based on the comparisons, opined that a fair ROI for the Woods measured before tax on equity was 25 percent.

The mobilehome owners submitted a declaration from their expert, Richard Nordstrom, Ph.D., a professor at California State University, Fresno. Dr. Nordstrom stated that the Woods' rents and profits since 1978 had increased at a greater rate than the CPI. His calculations, which compared the Gallands' return after debt service with their actual investment not adjusted for inflation, indicated the Gallands received a 24.9 percent ROI in 1987. He also criticized Dr. Findlay for comparing actual returns to average returns and returns from regulated investments to unregulated ones.

At the Commission hearing on December 16, 1988, the commissioners grappled with defining "investment" for purposes of calculating fair ROI. Dr. Nordstrom testified that return should be calculated on actual dollars invested with no adjustment for inflation. Dr. Findlay stated, albeit in a garbled fashion, that investment dollars must be adjusted for inflation.

The Commission, essentially accepting Dr. Nordstrom's opinion, concluded the Gallands were receiving a fair ROI and had not justified the rent increase. The commissioners reasoned that Dr. Findlay was of the opinion that a 25 percent ROI was fair. By Dr. Nordstrom's

calculations (using figures not adjusted for inflation), the Gallands received a 24.9 percent ROI in 1987. The Commission also found that both experts had calculated ROI without adjusting the initial investment for inflation, apparently misinterpreting Dr. Findlay's testimony that the ROI must be measured in "today's dollars" as meaning there was no need to adjust the initial investment for inflation.

The Gallands appealed the decision to the city council, criticizing the Commission's lack of inflation adjustment. The council heard the appeal on March 3, 1989. It affirmed the Commission's decision and adopted its findings. On March 29, 1989, the Gallands requested that Clovis prepare a record of the 1988 rent review proceedings pursuant to Code of Civil Procedure section 1094.6.

2. *1989 Rent Increase*

On June 29, 1989, the Gallands noticed a $25 a month rent increase effective September 1, 1989, which raised the per space rent to $294 a month. The mobilehome owners challenged the increase and the matter was set for hearing on September 29, 1989.

The Gallands supported the rent increase with updated figures noting that no rent increase had been permitted for two and a half years. Based on the CPI, the purchasing power of the current $269 rent (worth $119 in 1978 dollars) was less than the $144 rent charged in 1978. The increased rent of $294 would have been worth only $127.89 in 1978 dollars. The increased rent remained below market levels. In the past six months, four new mobilehome owners had rented spaces at the Woods for

$315. The Gallands contended they were not receiving a fair ROI. They renewed their argument that ROI calculations must be adjusted for inflation to prevent confiscatory results. The projected ROI for the Woods in 1989 was 9 percent, the same return realized in 1988.

The mobilehome owners responded that the low ROI appeared to be due to unusually high operating expenses. They opined that the increase reflected the Gallands' attempt to pass their unsuccessful rent review litigation costs on to the mobilehome owners.

The Commission, in its draft findings, relying on a misinterpretation of a CPI table presented in an unrelated rent proceeding, concluded that 60 percent of the items reflected in the CPI were not relevant to a mobilehome park. Therefore, the rent should be increased by an amount equal to 40 percent of the increase in the CPI. Under this formula, a $14 increase was justified. The Commission also concluded that legal and expert fees incurred in 1988 during the rent adjustment process should not be considered operating costs under the ordinance.

The Commission reviewed the draft findings with the parties at a hearing on November 3, 1989. Clovis's city attorney acknowledged the Commission should not have relied on the ex parte information without notice to the parties. The hearing was continued to give the parties an opportunity to review and respond to that information.

Despite the fact that the Gallands pointed out the fallacy of the Commission's method – misinterpreting the statistic that 42 percent of household income on average was spent on housing as signifying that increases in

housing prices equaled only 42 percent of the rate of inflation – the Commission readopted its earlier findings with minor modifications. As further explained below, the Commission did not issue a final decision until January 29, 1992. After the final decision issued, the Gallands appealed to the city council in February 1992.

Under the Ordinance, the Gallands could continue to collect the full $25 increase until an appeal before the city council was final. However, beginning February 1, 1990, they opted not to collect the disputed $11 portion of the noticed increase.

The appeal was eventually heard by the city council in May 1992. The council upheld the Commission's decision, finding it reasonable and supported by a preponderance of the evidence.

3. 1990 Rent Proceedings

In January 1990, the Gallands noticed a rent increase of $15 a month for mobilehome owners of double-wide mobilehome coaches, and $9 a month increase for mobilehome owners of single-wide coaches, effective April 1, 1990. The mobilehome owners petitioned for review of the increases, and a hearing on the matter was set for May 18, 1990.

The Gallands' submission included current financial figures showing an 8.1 percent return for the Woods in 1989, approximately the same return generated by certificates of deposit at local institutions. They also reiterated that standard accounting principles required the investment be adjusted for inflation in calculating ROI.

The mobilehome owners contended that the Gallands' stated expenses were inflated and further claimed that because the Woods' rent was the second highest in the Fresno/Clovis area, the Gallands were receiving more than a fair ROI. On May 8, 1990, 10 days before the scheduled hearing, the Commission asked the Gallands to provide additional information including an auditor's statement supporting the Gallands' reported expenses, further breakdown of a number of the income and expense categories, details regarding the Woods purchase, and copies of the Consumer Price Shelter Index for Pacific cities and the United States cities average categories for 1986 through 1989. The Gallands submitted the requested information. They also objected to a request by the mobilehome owners for further detailed financial and accounting information.

The Commission further requested that Chamberlain provide a sworn declaration setting forth details of the park's operation since 1978, including purchase, ownership, and day-to-day operations; daily, monthly, and annual business and accounting practices; the same information as to PMS; and auditing practices and procedures for the Woods, for other parks managed by PMS, and for the Gallands with regard to this investment. The Commission also requested additional information regarding utilities, water and sewer payments, interest income, management fees, lease payments and legal and accounting expenses. The Gallands complied, providing through Chamberlain a detailed 22-page declaration and 18 pages of additional information.

On August 2, 1990, the city attorney notified the Gallands that a Commission member had contacted the

mobilehome owners' representative and provided him with copies of public records relating to the case. The Commission provided copies of those materials to the Gallands and requested clarification of various matters including the Woods' purchase, and financing and lease payments, as well as Mr. Galland's status as a PMS shareholder.

Chamberlain submitted another declaration and supporting documents which explained the purchase/leaseback agreements. In May 1978, the Margaret G. Rose Testamentary Trust had agreed to provide the Gallands with $600,000 to purchase the Woods in exchange for title to the land and a 50-year leaseback. On June 9, 1978, the Gallands purchased the Woods from a third party for $4,158,625 (land, $500,000; improvements, $3,613,625; personal property, $45,000). The Gallands made a $600,000 down payment and the sellers took two notes. On August 1, 1978, the Gallands executed a grant deed to the trust as required by the terms of the May agreement.

Margaret G. Rose was Mrs. Galland's mother. She died in 1969 and the trust was created pursuant to her will. Mrs. Galland's father has a life estate in the trust. Income from the trust estate and, if necessary, principal, are used for his benefit. On his death, any remaining assets will be distributed to Mrs. Galland.

Mr. Galland was a 50 percent shareholder in PMS from 1978 until 1985 but received no compensation or dividends after he resigned as president in 1980. In 1985, Chamberlain purchased Mr. Galland's shares of stock in PMS.

The Commission, minus the member who had contacted the mobilehome owners, heard the matter on August 13, 1990. The Gallands presented evidence supporting the $15 and $9 rent increases. Their current ROI in the Woods (adjusted for inflation) was 8.1 percent, whereas what they claimed to be equally risky investments enjoyed a 20 to 25 percent rate of return.

Dr. Nordstrom testified for the mobilehome owners. He reversed his earlier position that the investment need not be adjusted for inflation and claimed that had been his position all along. He now believed the requested rent increase was not justified because the Gallands had misstated their investment in past years. He opined that the purchase/leaseback transaction had resulted in a down payment of zero rather than $600,000. Thus, the Gallands' investment consisted of principal payments on the mortgage only. By his calculations, the Gallands received a 140.63 percent ROI in 1989. Dr. Nordstrom also believed that management fees, lease payments and various extraordinary operating expenses should not be included in operating expenses in calculating cash flow. He further opined that a 14 percent ROI was fair, based in part on a similar average return for cable television franchises which, like mobilehomes, were regulated investments.

At the conclusion of the hearing, the Commission approved increases of $7.50 and $4.50, half of the increases requested. The Commission found the Woods was jointly owned by the Gallands and the Rose Trust. Therefore, the lease payments were ROI rather than expenses. In addition, the Commission disallowed attorney and expert fees incurred in the rent review proceedings. With these adjustments, the Gallands' return on the

inflation-adjusted investment was 11.8 percent. However, contrary to the opinion of both experts, the Commission concluded, based on "common sense," that the ROI calculation should be based on historic investment. Using the unadjusted figures, the approved rent increases yielded a 23.5 percent ROI, which the Commission deemed fair.

The Commission's final decision was not issued until January 29, 1992. Both parties appealed. The city council heard the appeals in May 1992, along with the Gallands' appeal of the Commission's decisions on the 1989 rent increase. The city council upheld the decision of the Commission.

The Gallands requested and Clovis granted the Woods rent increases in subsequent years and those proceedings are not before us. In 1993, Clovis amended its mobilehome rent control ordinance to permit automatic, across-the-board annual rent increases tied to the CPI.

B. Judicial Proceedings

In May 1990, the Gallands sued Clovis for damages for inverse condemnation, denial of substantive and procedural due process under the state and federal Constitutions, and for violations of civil rights under section 1983. They contended that Clovis's application of the Ordinance constituted a regulatory taking because it decreased the value of the property. They also claimed that Clovis's actions denied them a fair return on their investment. They filed concomitant petitions for writ of administrative mandate challenging the process employed and the denial or modification of the 1988 and

1989 rent increases. The matters were consolidated for trial. The Gallands filed a first amended complaint investment. They filed concomitant petitions for writ of administrative mandate challenging the process employed and the denial or modification of the 1988 and 1989 rent increases. The matters were consolidated for trial. The Gallands filed a first amended complaint in January 1993, adding allegations stemming from the 1990 rent review proceedings.

The Gallands alleged that Clovis denied them procedural due process by failing to provide adequate notice as to what they must prove to establish that a rent increase is not an "unreasonably high rent increase" under the Ordinance. Despite the Gallands' request for some standards, Clovis issued no written guidelines and the Commission's decisions were so inconsistent that they provided no de facto notice as to the owner's burden. In addition, Clovis's application of the rent review scheme denied the Gallands a fair hearing. The Commission relied on ex parte information without notice to the Gallands, it imposed costly and onerous information demands only to ignore the information when it was produced, it disallowed the Gallands' costs of complying with those requests as increased operating expenses to support a rent increase, it ignored uncontroverted expert evidence, and it made arbitrary and inconsistent findings to justify its decisions. Further, Clovis failed to issue final Commission decisions and to prepare the administrative record, thus preventing the Gallands from obtaining judicial review of the administrative proceedings and decisions.

The Gallands alleged that the same acts also denied them substantive due process. Clovis's actions in implementing rent control were arbitrary and unfair and placed an impermissibly onerous and costly burden on the park owner. As a result, the Gallands were denied a fair return on their property. Clovis's actions, which were taken in accordance with the custom of the municipality, deprived the Gallands of the right to due process in violation of section 1983.

The Gallands also challenged the Commission decisions pursuant to a writ of mandate action under Code of Civil Procedure section 1094.5 on a number of grounds, alleging essentially the same procedural and substantive due process violations as set forth in their complaint.

Clovis answered the complaint, essentially denying the allegations of wrongdoing. It did not assert any affirmative defenses. The case was set for trial on August 19, 1991.

Trial on the consolidated suit and writ proceeding was postponed repeatedly because of Clovis's delay in making a final decision regarding the 1989 and 1990 increases and in preparing the administrative record. Clovis contends that part of this delay was due to the fact that PMS and the mobilehome owners were involved in settlement discussions until April 1991 and the parties had requested that the final decision not be issued during that period. In August of 1991, the trial court ordered that final written decisions be prepared in all proceedings by October 1, 1991, and that the administrative record be lodged by November 1, 1991. Due to further delays on Clovis's part, however, final Commission decisions were

not issued until June 1, 1992, and the administrative record was not lodged with the trial court until June 3, 1993.

In August 1994, the court issued a statement of decision. It found that the manner in which the Commission and council applied and administered the Ordinance during the 1988, 1989, and 1990 rent review proceedings violated the Gallands' procedural and substantive due process rights. However, the violations did not effect a taking under the Fifth Amendment sufficient to support an inverse condemnation claim.

Based on the due process violations, the court granted the petitions for writ of administrative mandate, vacated the Commission decisions and dismissed the administrative proceedings that had denied the 1988, 1989, and 1990 rent increases. The court further determined that the expense and delay caused by the due process violations rendered the rehearing remedy provided by Code of Civil Procedure section 1094.5 "patently inadequate." The court concluded the Gallands were entitled to damages under section 1983 for their loss of a fair ROI and for the expenses, costs, and reasonable attorney fees incurred as a result of Clovis's arbitrary and unreasonable actions.

After hearings on the issue of liability and damages, the court awarded the Gallands damages pursuant to section 1983 as follows: (1) $247,885 for costs incurred as a result of the arbitrary and unreasonable administrative proceedings ($254,860 actually spent minus $6,975, what the Gallands would have spent absent the constitutional violations); (2) $236,806 for lost rents from 1988 through

March 31, 1995, based on the methodology stipulated to by the parties for calculating a fair ROI; (3) prejudgment interest on items (1) and (2); (4) attorney fees of $378,955; (5) costs of suit pursuant to Code of Civil Procedure section 1033.5; and (6) postjudgment interest from October 10, 1995.

The Court of Appeal affirmed. It found as to the first item of damage that Clovis's actions during the rent-setting process were indeed arbitrary and irrational and sufficient to sustain the award of damages for substantive due process violations. The Court of Appeal also concluded, for reasons explained more fully below, that our conclusion in *Kavanau, supra,* 16 Cal.4th 761, that lost rents can be compensated by adjustment of future rents did not apply to section 1983 actions, and that in any event, a *Kavanau* adjustment was inadequate in the present case.

II. Discussion

The Gallands bring two distinct due process claims under section 1983, corresponding to two different types of economic injury. The first injury stems from Clovis's failure to fully grant the requested rent increases, resulting in confiscatorily low rents. The second claimed injury is that they were compelled to pay excessive costs in order to obtain a rent increase. As we shall see, each of these injuries may be designated a violation of substantive due process rights. But the two types of injuries are distinct and require different analyses. For the sake of clarity, we will refer to the first type of injury, for the most part, as confiscation, and the second type of injury

as a substantive due process violation. We discuss each of these injuries in turn below.

A. Confiscation through Denial of Fair Rate of Return

The trial court awarded the Gallands $236,806 in damages from lost rents under section 1983. Clovis contends that insofar as the rent ceilings imposed on the Gallands was confiscatory, it should have the opportunity to cure this situation by adjusting future rent, as discussed in our decision in *Kavanau, supra,* 16 Cal.4th at pages 782-786. The Gallands, on the other hand, point out that *Kavanau* did not involve a section 1983 claim, and the law is well established that, except in the limited area of procedural due process violations, the existence of an alternative state remedy does not preclude the pursuit of a section 1983 remedy. (See, e.g., *Zinermon v. Burch* (1990) 494 U.S. 113, 125-126 (*Zinermon*).) Alternatively, the Gallands contends that a *Kavanau* adjustment does not apply in the present case because it is inadequate to compensate for the losses they were forced to incur. We will address each of these arguments in turn.

1. *Does a Kavanau Adjustment Apply When Section 1983 Damages Are Sought?*

In order to answer the above question, we must first clarify the precise nature of the constitutional injury that Galland is purported to have suffered – the denial of a fair return on their rent-controlled property.

As we recognized in *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165 (*Birkenfeld*), and later in *Kavanau*, price control regulation, including rent control, involves a distinct branch of constitutional inquiry under the due process clause. Such regulations are generally found to pass constitutional muster "so long as the law does not deprive investors of a 'fair return' and thereby become 'confiscatory.' [Citations.] Determining prices that will provide a fair return 'involves a balancing of the investor and the consumer interests.' [Citation.] 'It is the product of expert judgment which carries a presumption of validity.' [Citation.] A reviewing court focuses on whether the regulatory agency took relevant investor interests into account. [Citations.] . . . It is not theory but the impact of the [price regulation] which counts.' [Citation.] In sum, when considering whether a price regulation violates due process, a 'court must determine whether the [regulation] may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection for the heart of relevant public interests, both existing and foreseeable.' " (*Kavanau, supra*, 16 Cal.4th at pp. 771-772.) In other words, rent regulation must not prevent an efficient enterprise from " ' "operating successfully," ' " but rent regulators are permitted to adjust prices "within a 'broad zone of reasonableness,' " balancing the interests of landlords and tenants. (*Id.* at pp. 778-779.)

In *Kavanau*, we further held that a landlord may not obtain inverse condemnation damages against a government agency for temporarily imposing rent ceilings that a court had deemed confiscatory so long as the landlord

was able to obtain an adequate adjustment of prospective rents that would compensate for past losses. (*Kavanau, supra,* 16 Cal.4th at pp. 783-784.) As we explained:

"An adjustment of future rents that takes into consideration past confiscatory rents is the converse of the refund that producers in price-regulated industries may have to pay if, during litigation over price levels, they charge prices that a court later determines to be excessive. [Citation.] Moreover, this remedy, as opposed to an award of damages against the Rent Board, places the cost of compensating [the landlord] roughly on those tenants who benefited from unconstitutionally low rents. [Citations.] . . .

"Finally, the remedy of future rent adjustments avoids putting a reviewing court in the position of declaring the appropriate regulated rent ceiling for a particular apartment in order to measure damages. [Citation.] Setting rent ceilings is essentially a legislative task, and agencies, not courts, choose which administrative formula to apply. [Citation.] The state and federal Constitutions require only a fair process that reasonably takes into consideration the landlord's interests, and a landlord's return need only fall within a 'broad zone of reasonableness.' [Citation.] Accordingly, courts are in no position to determine the appropriate rent ceiling for an apartment as a means of assessing damages. We strongly resist any rule that would impose on a reviewing court the impossible task of finding somewhere in the penumbra of the Constitution a stipulation that a particular apartment in a particular building should rent for $746 per month rather than $745." (*Kavanau, supra,* 16 Cal.4th at pp. 783-784.)

As we made clear in *Kavanau* and elsewhere, a landlord under rent control who is permitted no or excessively low rent increases has the means, via a writ of mandate, to judicially challenge a rent board's actions. (See, e.g., *Kavanau, supra,* 16 Cal.4th at p. 767; *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 287.) As we also made clear, a landlord is charged with the duty to take advantage of such a remedy before seeking damages against a municipality: "A landlord who unnecessarily permits large losses to accumulate cannot complain if the market prevents him from recouping those losses." (*Kavanau, supra,* 16 Cal.4th at p. 785.)

Of course, the fact that overlapping state remedies are available is generally irrelevant to the question whether a cause of action exists under section 1983. (*Zinermon, supra,* 494 U.S. at pp. 124-125.) We expressly left undecided the question whether the availability of an adequate *Kavanau* adjustment precludes a section 1983 claim. (*Kavanau, supra,* 16 Cal.4th at pp. 768, 783.) The answer to this question depends upon whether a *Kavanau* adjustment is most appropriately characterized as preventing a substantive due process injury from occurring, or if it is better characterized as compensating for a substantive due process injury that has already occurred. If the former, then there would be no substantive due process injury, and no section 1983 claim. If the latter, then the contrary would be true.

The answer to this question in turn lies in the peculiar nature of the constitutional injury inflicted by a confiscatory rate regulation, as suggested by the above discussion. The term "confiscatory" is often used in the

context of price regulation to describe a rate ceiling or ordinance that potentially or eventually will cause confiscation. (See *Birkenfeld, supra,* 17 Cal.3d at p. 169.) But this is not to say that a *delay* in the upward adjustment of rents to nonconfiscatory levels works substantive due process injury. Indeed, in the field of public utility regulation, the proper remedy for delay in the upward adjustment of rents, or "regulatory lag," has been equitable relief to enforce the proper rates, not monetary damages against the regulator. (Priest, Principles of Public Utility Regulation (1969) pp. 204-206; see, e.g., *Smith v. Ill. Bell Tel. Co.* (1926) 270 U.S. 587, 591-592.) Thus, a rent control regime that permits landlords to challenge confiscatory regulations in state court via a writ of mandate, and which permits the timely adjustment of future rents to compensate for any regulatory lags that may have occurred, is one that passes constitutional muster.

We suggested as much in *Kavanau* when rejecting the landlord's takings argument in that case. "Just as a reviewing court averages the effects of subsidiary aspects of a price-setting scheme by looking at 'net effect' [citation], a reviewing court can also average the effects of a price-setting scheme over time. Thus, a fair return over the course of several years will offset a confiscatory return during a particular year. Recognizing that [the landlord] has a continuing right under the due process clause to future rent adjustments that will enable him to earn a fair return, we believe he has not suffered a taking. Put another way, the ongoing process of setting rent ceilings dispels the due process violation, which in this case is the sole basis for a potential takings clause violation." (*Kavanau, supra,* 16 Cal.4th at pp. 785-786; see also

Yee v. Mobilehome Park Rental Review Bd. (1998) 62 Cal.App.4th 1409, 1423-1427 [because of available *Kavanau* adjustment, no damages available under section 1983 for lost rents due to excessively low rent ceilings].) *Kavanau* therefore implies that a system of rent regulation sufficiently flexible to adjust rates upward to compensate for delay inflicts no constitutional injury.

To be sure, *Kavanau* involved a takings claim, and this case is concerned with what is labeled substantive due process. But we have recognized that a price regulation that causes confiscation may be designated interchangeably as either a taking of property under the Fifth and Fourteenth Amendments of the United States Constitution or a violation of due process. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 967; *Kavanau, supra,* 16 Cal.4th at pp. 776-777; see also *Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 307-308.) It would be incongruous for us to conclude, on the one hand, as we did in *Kavanau,* that a landlord permitted adequate rent adjustments has not suffered a constitutional injury under the takings clause, but, on the other hand, that he or she has suffered such an injury under the due process clause.[3]

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[3] The dissent asserts, contrary to authority, that substantive due process provides a more exacting standard for determining whether a regulation is confiscatory than does the takings clause at issue in *Kavanau. Kavanau*'s holding was not based on such a distinction, but on the well-established principle that the Constitution permits government regulators great flexibility in making price control decisions and that, accordingly, delays in lawful price adjustment are not per se constitutional violations.

This conclusion is also consistent with the recognition that mobilehome rental property is a long-term capital asset, the value of which is determined by a stream of income expected over a number of years. (See Radford, *Regulatory Takings Law in the 1990's: The Death of Rent*

For a similar reason, the dissent is off the mark when it analogizes this case to cases of racial discrimination and claims that no *Kavanau*-like remedy would be permitted for such discrimination. Of course, discrimination based on a suspect class such as race will receive the strictest judicial scrutiny and not be permitted absent the most compelling interest. (*Hunter v. Erickson* (1969) 393 U.S. 385, 391-392.) Governmental acts of deliberate racial discrimination are almost invariably constitutional violations cognizable under section 1983. (See *Washington v. Davis* (1976) 426 U.S. 229, 239-241.) On the other hand, given the discretion permitted the government in regulating prices, delays in price adjustments cannot be considered the constitutional equivalent of intentional racial discrimination.

The dissent, as well as the concurring and dissenting opinion, are also incorrect that *Kavanau's* holding should be interpreted as a requirement for landlords to exhaust administrative remedies before seeking constitutional damages, contrary to established law. (See *Patsy v. Florida Board of Regents* (1982) 457 U.S. 296; *Felder v. Casey* (1987) 487 U.S. 131.) Rather, as explained above, a prospective rent remedy prevents a taking, and implicitly a substantive due process violation, from occurring. In fact, neither the dissent nor the concurring and dissenting opinion cite authority for the proposition that a regulatory delay in a lawful price adjustment gives rise to an actionable substantive due process violation under section 1983. Perhaps cognizant of this lack of authority, the dissent "wonder[s] if we took the wrong turn long ago when we began treating rent control like any other price-regulated industry." (Dis. opn., *post*, at p. 10.) It offers no persuasive reason, however, for reevaluating precedent on this point. (See *Pennell v. City of San Jose* (1988) 485 U.S. 1, 11-12.)

Control? (1992) 21 Sw.U. L.Rev. 1019, 1035; see also Brealy & Stewart, Principles of Corporate Finance (4th ed. 1991) p. 30.) An excessively low rate of return followed by an adequate adjustment of future rents will allow a reasonable average return over the life of the investment and therefore avoid confiscation.

Of course, an excessively low rent sustained over a long duration may well inflict losses that no rent adjustment can cure. But as noted, we emphasized in *Kavanau* that a landlord generally has the capacity to prevent large losses through resort to available state remedies: "[I]f a landlord acts promptly to challenge a confiscatory regulation, and seeks a stay of that regulation during litigation, his losses, and thus any future rent adjustments, are likely to be relatively small. A landlord who unnecessarily permits large losses to accumulate cannot complain if the market prevents him from recouping those losses." (*Kavanau, supra,* 16 Cal.4th at p. 785.) A section 1983 remedy is available for constitutional injury inflicted by those acting under color of state law. When the state makes available a judicial procedure that can feasibly *prevent* a constitutional injury from occurring, no section 1983 remedy will lie when a plaintiff fails to avail himself or herself of that procedure.

It may be, of course, that even if the landlord acts reasonably to prevent large losses from accumulating, a *Kavanau* adjustment would be inadequate. In *Kavanau,* we stated that we did not need to "decide what alternative remedy might be appropriate if a landlord can establish that the remedy of future rent adjustments is for some reason unavailable. . . . [B]efore [a landlord] can allege the unavailability of future rent adjustments, he must

petition for those adjustments, the Rent Board must determine, subject to judicial review, their appropriate amount, and he must attempt to impose them." (*Kavanau, supra,* 16 Cal.4th at p. 785.) Accordingly, when landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate.

Applying this test to the present case, we first consider whether the rent ceilings imposed from 1988 to 1990 were confiscatory. Although the trial court concluded that they were, that conclusion was based at least in part on the questionable assumption that the Gallands were constitutionally entitled to an ROI of between 20 and 25 percent. Because there appears to have been considerable confusion in the courts below as to what constitutes a confiscatory rate of return, we offer the following guidance on remand:

Although the term "fair rate of return" borrows from the terminology of economics and finance, it is as used in this context a legal, constitutional term. It refers to a constitutional *minimum* within a broad zone of reasonableness. As explained above, within this broad zone, the rate regulator is balancing the interests of investors, i.e., landlords, with the interests of consumers, i.e., mobilehome owners, in order to achieve a rent level that will on the one hand maintain the affordability of the mobilehome park and on the other hand allow the landlord to continue to operate successfully. (*Kavanau, supra,* 16 Cal.4th at pp. 778-779.) For those price-regulated investments that fall above the constitutional minimum,

but are nonetheless disappointing to investor expectations, the solution is not constitutional litigation but, as with nonregulated investments, the liquidation of the investments and the transfer of capital to more lucrative enterprises.

Of course, a valid price control scheme must permit an efficiently run company, subject to market constraints, to earn a " 'return . . . commensurate with returns on investments in other enterprises having corresponding risks.' " (*Kavanau, supra,* 16 Cal.4th at p. 772.) The Gallands correctly cite our opinion in *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 683, for the proposition that rent regulators must generally permit profits to be adjusted over time for inflation so that the real value of that profit does not shrink toward the vanishing point. But as we also held in *Fisher,* it is obviously not the case that a rent controlled investment must earn the same as a non-rent-controlled one: " '[S]ome lessening of appreciation is a necessary consequence of any rent control, since future appreciation is to a significant extent a function of increased rental income. [Citation.] It is one of the very sources of long-term appreciation – inflated rents – that rent control measures are intended to restrict.' [Citation.] [¶] . . . Any price-setting regulation, like most other police power regulations of property rights, has the inevitable effect of reducing the value of regulated properties. But it has long been held that such reduction in property value does not by itself render a regulation unconstitutional. Police power legislation results in a confiscatory 'taking' only when the owner has been deprived of substantially all reasonable use of the property. [Citation.] Even a significant diminution in value is insufficient to

establish a confiscatory taking." (*Fisher v. City of Berkeley, supra*, 37 Cal.3d at pp. 685-686, fn. omitted.) Thus, comparison of the rate of return of rent controlled mobilehome parks with those of non-rent-controlled parks, as the Gallands made and the trial court accepted in the present case, is of limited utility in establishing the constitutional minimum rate of return. Moreover, there is nothing in the record to indicate that the average rate of return of the 16 PMS parks surveyed, which were not randomly chosen, was the same as or similar to the average return on mobilehome parks nationally, or, more to the point, the average return on mobilehome parks in the Clovis area.

Furthermore, PMS's own data indicates that market forces, rather than rent control, were primarily responsible for the Woods' relatively poor performance in relationship to other PMS mobilehome parks surveyed. This data shows, for example, that in 1987, the year before the present controversy commenced, the ROI for the Woods was 11.8 percent, whereas the average for ROI for the 16 other parks was 22.6 percent. But the data also reveals that in 1987, the base monthly rent charged at the Woods, $269, was *equal to* the market rate rents. Thus, although the Woods had only a 9 percent ROI in 1988 and 1989, according to its own data, the same data also indicate that this rate of return for rent controlled property was only slightly below the return the market afforded, and that the wide gap between the Woods and other PMS parks was largely due to factors other than Clovis's rent control. (See *Yee v. Mobilehome Park Rental Review Bd., supra,*

62 Cal.App.4th at pp. 1414-1415 [10 percent return on equity in 1994 considered fair by both parties].)[4]

Moreover, as explained above, one measure of whether a regulated enterprise is allowed to operate successfully is whether it continues to attract necessary capital. (*Kavanau, supra,* 16 Cal.4th at p. 772.) We note that in 1993, during the period that the Gallands were subject to supposedly confiscatory rent ceilings, they were able to obtain a $3 million refinancing loan on the Woods on standard terms for commercial property.

Thus, on remand, the trial court must consider not whether the return on the Woods measured up to some benchmark established by nonregulated investments, but rather whether the 1988 to 1990 rent ceilings were within the constitutionally permitted broad zone of reasonableness.

On the other hand, the Gallands are correct that the substantial legal and administrative costs attributable to the rent review process, discussed at greater length in the next part of this opinion, should be properly included as expenses when calculating the proper rent readjustment. Under the fair ROI method used in practice by Clovis, it

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[4] At oral argument, the Gallands' counsel argued that a *Kavanau* adjustment would be ineffective because the record showed that there had never been more than a $20 difference between the regulated rent and the market rent, and therefore there would be a severe practical limit on the upward adjustment of rents called for under *Kavanau*. Yet the fact that there was such a small margin between regulated rent and market rent calls into question whether confiscation did indeed take place and, in any case, suggests that the confiscation, if any, was correspondingly limited.

may not arbitrarily exclude the reasonable expenses of seeking legitimate rent increases.

Clovis argues that *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside* (1984) 157 Cal.App.3d 887 stands for the proposition that a city may not be constitutionally required to include the landlords' costs of obtaining rent increases as operating expenses when calculating the proper rent levels. Clovis is correct, but only up to a point. In *City of Oceanside*, the court considered a facial challenge to an ordinance, including a challenge to a provision excluding attorney fees from operating expenses. The court correctly rejected this facial challenge. As explained above, it is the overall result of the rent-setting process, not the method employed or any particular exemption legislated, that determines whether a rent control regime is confiscatory. (*Kavanau, supra,* 16 Cal.4th at pp. 771-772.) Thus, the exclusion of costs associated with obtaining rent increases is not per se confiscatory. On the other hand, if a rent control ordinance as applied operates to impose large and unnecessary costs on landlords, and if as a result of that imposition a landlord is only able to garner a rate of return that is deemed confiscatory, we may not ignore the confiscation simply because these costs have been classified as exempt expenses. Accordingly, these expenses must also be considered on remand when determining whether and to what extent Clovis's rent regulation has been confiscatory and whether remand for a determination of *Kavanau* adjustment is appropriate.

2. *Was a Kavanau Adjustment Inadequate as a Matter of Law?*

If the trial court reaffirms that the rent ceilings were confiscatory to some extent, then the matter would generally be remanded to the Clovis City Council to attempt a *Kavanau* adjustment. The Court of Appeal held that a *Kavanau* adjustment would be inadequate as a matter of law. Its conclusion was based primarily on the substantial sum of damages accruing from lost rents – $236,806 – in part because of Clovis's long delay in reaching a final decision and preparing the administrative record, which postponed the Gallands' mandamus remedy.

As discussed, we generally presume that a landlord has the means to obtain judicial intervention to prevent large financial losses. But in the present case, although the parties argue over the length of Clovis's unjustifiable delay in preparing the administrative record, even Clovis concedes that there was some period of unnecessary delay that may have retarded the Gallands' ability, through judicial intervention, to prevent their losses from accumulating. Although the trial court did not address this question precisely, it found, in the context of rejecting Clovis's statute of limitations defense, a "delay in providing the administrative record for 1988, 1989 and 1990, and the co-extensive delay in issuing final decisions for the 1989 and 1990 administrative proceedings. . . . " On the other hand, the Ordinance allowed the Woods rent increases to go into effect and did not require the Gallands to rescind them until the city council's decision was final in 1992. The Gallands voluntarily rescinded at least a portion of their rent increases after the Commission's

decision. The trial court must determine on remand whether, under the circumstances, the Gallands reasonably used the available legal machinery to prevent a constitutional injury from occurring.

Even if it is concluded that the Gallands suffered undue delay, the question whether a *Kavanau* adjustment is adequate is in large part a factual one, and not for the speculation of an appellate court. Here, we note that although the amount of the alleged lost rent is fairly substantial, the Woods has 260 units, and it is therefore within the realm of possibility that lost rents could be recouped over a relatively short period of time with realistic rent increases. In any case, both Clovis's decisions and those of the trial court predated our decision in *Kavanau*. Assuming that the Gallands are able to demonstrate the rent ceilings were confiscatory, as discussed above, it is for Clovis to attempt on remand to adjust rent ceilings to compensate for lost rents, and for the trial court to review whether such adjustments are adequate to meet the constitutional standard for a fair return. This remand "avoids putting a reviewing court in the position of declaring the appropriate regulated rent ceiling for a particular apartment in order to measure damages" (*Kavanau, supra,* 16 Cal.4th at p. 784), and places the rate-setting function first and foremost in the hands of the government agency (*ibid.*). If, however, a *Kavanau* adjustment proves to be inadequate in this case to reestablish an average reasonable rate of return, then the Gallands would be free to file a section 1983 action on the grounds

that state equitable remedies have failed to prevent the constitutional injury from occurring.[5]

It is conceivable there might be a case when it is clear that resort to a *Kavanau* adjustment will not prevent a constitutional injury from occurring. For example, there may be an instance when, despite a landlord's reasonable efforts, confiscatory rent regulations sustained over a long period of time have caused the enterprise to fail.

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[5] The Court of Appeal briefly mentioned two other reasons for not resorting to a *Kavanau* adjustment. The first is that many of the Woods mobile home owners are elderly and therefore a "*Kavanau* remedy [is] less likely to place the cost of compensating the Gallands on those [mobilehome owners] who benefited from the confiscatory rents. . . . " This reason is speculative and ill founded. Although future rent adjustments may not fall with mathematical exactitude on those who have benefited from an excessively low rent ceiling, such adjustments nonetheless place the burden of compensating the landlord on the group that has, as a whole, most benefited, as well as on new tenants freely transacting to pay higher rents. (See *Kavanau, supra,* 16 Cal.4th at p. 784.)

The Court of Appeal also stated that "the long and tortured path this case has taken to date militates against sending the matter back for further administrative proceedings addressing these ancient clams." [sic] But remand to the city is what *Kavanau* prescribes. It might be a different matter if there were evidence that a government agency had proven to be unwilling or unable to conduct the proper proceedings on remand. Here, on the contrary, Clovis has endeavored to amend its rent control ordinance to make it more efficient and expeditious. If Clovis engages, however, in further needless delay, then a writ of mandate to the trial court may legitimately request that the court intervene to set the proper rental rates, and the city may be liable for section 1983 damages.

Under such circumstances, a section 1983 damages remedy may well be available. But nothing of that sort is evident in the record of the present case.

B. Excessive Procedural Costs

The Gallands claim, and the trial court found, that they were damaged in the amount of $247,885 for costs incurred as a result of arbitrary and unreasonable administrative proceedings. Although difficult to pigeonhole, this claim is properly understood more as a substantive, rather than as a procedural, due process claim. A procedural due process claim possesses two components: First, that an individual has been deprived of a constitutionally protected liberty or property interest; and second, that this deprivation, while not necessarily unconstitutional in and of itself, was rendered unconstitutional because it was undertaken without according the individual the appropriate hearing. (See, e.g., *Zinermon, supra,* 494 U.S. at pp. 133-134.) In the present case, however, the Gallands contend that the rent control process was itself an independent source of injury, by imposing on them exorbitant costs for what the trial court termed Clovis's "overly broad, unduly burdensome, arbitrary, unreasonable, and inconsistent requests for information" in order to obtain legitimate rent increases. In other words, the source of their injury was not the lack of procedural protections that led to the denial of a fair rent increase, but the fact that Clovis made demands on them as a condition of obtaining a rent increase that, in addition to being costly, were intrinsically arbitrary and irrational. This is best understood as a claimed violation of substantive due process.

The question, then, is whether Clovis's actions during the rent adjustment hearings of 1988 to 1990, independent of the outcome of those hearings (which was addressed in the previous part of this opinion), violated the Gallands' substantive due process rights. In order to answer this question, we must first understand in greater depth the nature of those rights. To do so, we begin with the recent clarification of the meaning of substantive due process in *County of Sacramento v. Lewis* (1998) 523 U.S. 833 (*County of Sacramento*).

In *County of Sacramento*, the parents of a motorcycle passenger killed in a high-speed chase sued the county and the responsible officer for violations of substantive due process rights under section 1983. In rejecting their claim, the United States Supreme Court explained: "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action: . . . [¶] . . . While due process protection in the substantive sense limits what the government may do in both its legislative [citation] and its executive capacities [citation], criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue. [¶] Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' [citation], thereby recognizing the point made in different circumstances by Chief Justice Marshall, ' "that it is a *constitution* we are expounding" ' [citations.]. Thus, . . . we [have] said that the Due Process Clause was intended to prevent government officials from ' "abusing [their] power or employing it as an

instrument of oppression." ' [Citations.] [¶] To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which *shocks the conscience*. . . . [¶] It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. . . . [W]e [have] explained that the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States,' [citation] and . . . that '[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.' We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; *liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.* [Citations.] It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to

rise to the conscience-shocking level." (*County of Sacramento, supra,* 523 U.S. at pp. 845-849, fn. omitted, italics added.)

The Gallands argue that *County of Sacramento* is inapposite inasmuch as it pertains to executive action, whereas Clovis's actions are what it characterizes as "quasi-judicial." Of course, most executive or administrative agencies perform quasi-judicial functions. These functions, when carried out by such agencies, are more appropriately designated as executive rather than legislative functions – they are implementing legislation, not legislating. The Gallands' argument is valid, however, insofar as it recognizes that the determination of when a substantive due process violation occurs is contextual. As the *County of Sacramento* court itself suggested, a less egregious government action than was committed in that case may "shock the conscience" if the executive or administrative actor had an opportunity to deliberate. Thus, for example, the court recognized that the most appropriate substantive due process standard for injury inflicted on a person in custody may be "deliberate indifference," as it is under the Eighth Amendment, although the court rejected the "deliberate indifference" standard in the context of high-speed chases. (*County of Sacramento, supra,* 523 U.S. at p. 851.)

Nonetheless, other cases both before and after *County of Sacramento* have affirmed in a variety of contexts, using a variety of verbal formulations, the principle that the arbitrary government conduct that triggers a substantive due process violation is not ordinary government error but conduct that is in some sense outrageous or egregious – a true abuse of power. (See, e.g., *Fagan v. City of Vineland*

(3d Cir. 1994) 22 F.3d 1296, 1306 ["shock the conscience" standard used for police pursuit, "deliberate indifference" standard for those in custody)]; *Natale v. Town of Ridgefield* (2d Cir. 1999) 170 F.3d 258, 263 [rejecting substantive due process claim regarding issuance of building and zoning permits and affirming that "[s]ubstantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority"]; *Creative Environments, Inc. v. Estabrook* (1st Cir. 1982) 680 F.2d 822, 832-833 [ordinary state law error in land use planning process not a substantive due process violation]); *Uhlrig v. Harder* (10th Cir. 1995) 64 F.3d 567, 574 [in the context of arguable government negligence leading to murder of therapist by criminally insane mental patient, court affirms that substantive due process violation must be intentional or reckless and that the "degree of outrageousness and a magnitude of potential or actual harm [must be] truly conscience shocking"]; *Rivkin v. Dover Tp. Rent Leveling Bd.* (N.J. 1996) 671 A.2d 567, 574-575 (*Rivkin*) [rejecting claim that errors in mobilehome rent review process amounted to substantive due process violation, and affirming that "substantive due process is reserved for the most egregious governmental abuses against liberty or property rights"]; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1186 [zoning decision that violated state law in some respects but was not wholly irrational and did not shock the conscience was not a substantive due process violation].)

The New Jersey Supreme Court in *Rivkin, supra,* a case like our own in some respects, concisely explained

why the mere finding that a government decision is arbitrary or capricious is not sufficient to establish a substantive due process violation. In that case, a mobilehome park owner brought an action against a municipality for denying a requested rent increase in a proceeding that was tainted with the open bias and conflict of interest of one of its members. In rejecting the owner's section 1983 substantive due process claim, the court stated: "It is a mistake . . . to equate the concept of 'arbitrary and irrational' governmental land use decisions with the substantive component of the Due Process Clause of the Fourteenth Amendment. In the land use context, the phrases 'arbitrary and irrational' or 'capricious' are often shorthand expressions for a standard of review that asks whether there are sufficient facts in the record to support the agency's action or whether the agency has followed its legislative mandate. . . . [¶] '[F]requently in our law a court on an appeal from action of a public agency will determine if the agency acted arbitrarily or capriciously. Accordingly while the words "arbitrary and capricious" may sound harsh, they are simply the standard of appellate review in particular cases.' [Citations.] [¶] It is for this reason that . . . substantive due process protections should be reserved for 'truly irrational' governmental abuses that bear no relationship to the merits of the pending matter." (*Rivkin, supra,* 671 A.2d at pp. 576-577.)

Moreover, the notion that a cognizable section 1983 action is found only in circumstances of outrageous government abuse applies even when it leaves a person seriously injured by government action or inaction without a remedy, as when the government is protected from liability by state law statutory immunities. Thus, in

Davidson v. Cannon (1986) 474 U.S. 344, 346-348, for example, a prisoner who was beaten by a fellow inmate after prison officials negligently failed to intervene, was denied any section 1983 relief, and was also unable to pursue a tort action due to state law immunity.

Against this background, we must formulate more precisely the appropriate substantive due process standard for determining when an administrative body charged with implementing a law acts erroneously in such a way as to injure an individual's economic and property interests. The shocks the conscience standard, although generally applicable, is not particularly helpful. As the *County of Sacramento* court recognized, that standard is "no calibrated yard stick," but merely "poin[ts] the way." (*County of Sacramento, supra,* 523 U.S. at p. 847.) The standard seems especially apt with regard to assaults on bodily integrity by government officials – when, as Justice Frankfurter stated, government action moves "too close to the rack and screw to permit of constitutional differentiation." (*Rochin v. California* (1951) 342 U.S. 165, 172.) Is there a standard that can identify more precisely when the actions of an administrative body charged with implementing the law are arbitrary and conscience shocking in a constitutional sense?

We conclude that the court in *Silverman v. Barry* (D.C. Cir. 1988) 845 F.2d 1072 has given the most satisfactory answer to this question. In that case, a series of arguably unjustifiable administrative delays led to the frustration of the plaintiff's plans to convert his building from a rental into condominium before a conversion moratorium was imposed. The court stated: "To succeed in a section 1983 suit for damages for a substantive due process

. . . violation, a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities. Only a substantial infringement of state law prompted by personal or group animus, or *a deliberate flouting of the law that trammels significant personal or property rights,* qualifies for relief under section 1983. [Citation.] Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under this statute." (*Id.* at p. 1080, italics added.) We conclude that the above standard is consistent with the Supreme Court's most recent pronouncements regarding substantive due process violations for executive action. Because substantive due process does not encompass "negligently inflicted harm" (*City of Sacramento, supra,* 523 U.S. at p. 848), but rather "only the most egregious official conduct," wherein government officials are " '[abusing their] power, or employing it as an instrument of oppression' " (*id.* at p. 846), it cannot be said to encompass governmental mistakes and bureaucratic errors that are something less than an abuse of power.

Roy v. City of Augusta, Maine (1st Cir.1983) 712 F.2d 1517, cited by the *Barry* court, illustrates this deliberate flouting of the law standard. In *Roy,* the Supreme Judicial Court of Maine decided that the city had wrongfully denied plaintiff the renewal of a license to operate a pool and billiard room that had met with some community opposition. In response to the resultant court order, the city clerk issued the license that the plaintiff had originally sought but that had expired in the interim. As a result, the plaintiff had to suspend his business activities, lost his property, and filed a section 1983 action against

the city. The court reaffirmed the rule it had stated in *Creative Environments Inc. v. Estabrook, supra,* 680 F.2d 822, that ordinary state law error does not amount to a substantive due process violation. Nonetheless, the court reversed the district court's dismissal of the complaint, concluding that the plaintiff would have a valid claim of a substantive due process violation if it could "prove that his injury was due not merely to the law's delay and [the government's] errors but to defendants' deliberate disregard of the state's fundamental process." (*Roy v. City of Augusta, Maine, supra,* 712 F.2d at p. 1524.)[6]

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[6] This standard is similar to the rule we articulated in the takings contexts in *Landgate v. California Coastal Commission* (1997) 17 Cal.4th 1006. We held in that case that a delay in development caused by a government agency's mistaken assumption of jurisdiction over a lot line adjustment was not a temporary taking of property under the Fifth and Fourteenth Amendments to United States Constitution. We evaluated the Coastal Commission's action against the standard that a denial of the development project that does not substantially advance a legitimate state interest constitutes a taking of property (see *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 704-705), and found that the Coastal Commission's actions, although erroneous, did in fact advance such an interest by contributing to the goals of coastal protection with which it was charged. (*Landgate,* at pp. 1023-1024.) We further held that the agency's legal error was not sufficient to constitute constitutional error, and that the latter would be implicated only if the agency's action was "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." (*Id.* at p. 1024.) We also held that "[t]he proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the

This standard is consistent with the holding of a series of cases, some of which are cited by the Gallands, that find substantive due process violations when municipalities refuse to issue nondiscretionary building permits. (See *Mission Springs, Inc. v. City of Spokane* (Wash. 1998) 954 P. 2d 250 (*Mission Springs*); *Bateson v. Geisse* (9th Cir. 1988) 857 F.2d 1300, 1303-1305; *Bello v. Walker* (3d Cir. 1988) 840 F.2d 1124, 1129; *Scott v. Greenville County* (4th Cir. 1983) 716 F.2d 1409, 1419.) For example, in *Mission Springs, supra*, 954 P.2d 250, a developer that had run the entire gauntlet of zoning and planning requirements was denied building permits by the city council, even though it was clear from applicable statutes and ordinances, and from the advice of the city attorney, that the city council had no discretion at that point to deny the permits. (*Mission Springs, supra*, 954 P.2d at pp. 252-259.) Such refusal to issue clearly nondiscretionary permits is properly characterized as a deliberate flouting of the law.[7]

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latter." (*Id.* at p. 1022.) So too, in the case of substantive due process, evidence of deliberate flouting of the law is generally to be gleaned from the fact that a government agency's actions substantially and unreasonably diverged from clear legal rules, as the cases cited in the text immediately following illustrate.

[7] Other courts have found substantive due process violations by municipal regulators when it is clear from the record that the decision was motivated by economic conflict of interest or political animus rather than any legitimate governmental interest. (See *DeBlasio v. Zoning Bd. of Adjustment* (3d Cir. 1995) 53 F.3d 592, 601-602; *Brady v. Town of Colchester* (2d Cir. 1988) 863 F.2d 205, 215-216; but see *Rivkin, supra*, 671 A.2d 576-577 [blatant bias of one member of rent control board may violate state law but does not implicate substantive due process].) Without deciding whether the substantive due process standards enunciated or implicit in these cases are

(See also *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 561 [denial of development permits after numerous violations of the city's own procedures as well as state law amounts to a "cavalier . . . disregard[ ]" of developers' substantive and procedural due process rights].)[8]

In cases such as the present, a deliberate flouting of the law may be said to have occurred if the city's demands for information and other procedural demands were so excessive and irrelevant to the regulatory task at

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correct, we note that no such conflict of interest or political animus is alleged in the present case.

[8] The Gallands also cite *Sierra Lake Reserve v. City of Rocklin* (9th Cir. 1991) 938 F.2d 951, vacated in part by (1993) 987 F.2d 662 (*Sierra Lake Reserve*), for the proposition that arbitrary government conduct by itself can support a substantive due process violation. In that case, a rent increase was delayed by little over a year due to various procedural obstacles. (*Id.* at pp. 953-954.) Most of the opinion focused on a reaffirmation of the court's doctrine that mobilehome rent control as commonly manifested in California was a physical taking of property, a doctrine repudiated by the United States Supreme Court in *Yee v. Escondido, supra*, 503 U.S. 519. The court's brief discussion of substantive due process concluded that, from the facts alleged in the complaint, "[i]t is well within the realm of possibility that plaintiff could establish that the City's actions in processing the applications were wrongful or arbitrary," and therefore a basis for a substantive due process claim. (*Sierra Lake Reserve, supra*, 938 F.2d at p. 958.) Insofar as *Sierra Lake Reserve* can be taken to stand for the proposition that wrongful or arbitrary government action is per se a basis for a substantive due process claim, we believe it is contrary to the principle recently clarified in United States Supreme Court and other cases discussed above, that only egregious conduct by government agencies can give rise to such claims.

hand as to lead a court to conclude that such demands were imposed not in order to obtain more information or increase the reliability of the eventual decision, but rather to obstruct or discourage landlords from either requesting or obtaining reasonable rent increases to which they are constitutionally entitled. We emphasize, however, that something more than mere "bureaucratic bungling" is required. Rent control boards, like other regulators, have need of information from those regulated, and the act of requesting information is itself a legitimate government activity. Even if, for example, the information requested is in retrospect excessive in relationship to the relevant inquiry, that does not of itself constitute a due process violation compensable under section 1983.

Consistent with the deliberate flouting of law standard announced today, we hold as a prospective rule that, if faced with a situation similar to this case, a landlord who believes that a rent board's information request is arbitrary and overly burdensome must register an objection to the request and give some explanation for the objection. This then puts the board on notice that the request is considered overreaching, and gives the board the opportunity to respond. If the board nonetheless insists on the information, then the landlord has the option of either submitting the information under protest or refusing to fully comply with information request. If the board then denies the application, either on the merits or based on the fact that not enough information had been provided, the landlord may then seek a writ of mandate overturning the decision. If the board based its decision on a failure to provide sufficient information, then the court would determine whether the information

submitted was in fact sufficient. In making that determination, a court would look to analogous areas of law such as the law of administrative subpoenas. (See *Connecticut Indemnity Co. v. Superior Court* (2000) 23 Cal.4th 807, 817; 2 LaFave, Search and Seizure (3d ed. 1996) § 4.13(d), pp. 740-741 [in determining whether a subpoena's request for information is excessive, courts perform a balancing test, considering factors including: (1) the scope of the investigation; (2) the probability that the records will reveal evidence helpful to the investigation; (3) the financial or economic burden that compliance imposes on the subpoenaed party].)

With the appropriate standard in mind, we review the trial court's determination that the Gallands suffered $247,885 in damages from substantive due process violations because of the "arbitrary, unduly burdensome, and unreasonable actions" of Clovis in requiring expensive and unnecessary audits and other data during rent adjustment proceedings. We observe at the outset that these proceedings were, at the very least, inefficient. Neither the Ordinance nor any implementing regulations made clear precisely how the Gallands were to obtain a rent increase. This regulatory vacuum was filled by an ad hoc proceeding marked by Clovis's shifting, costly, and at times ill-considered requests for information. As a result, the Gallands lacked a timely and affordable means by which to seek rent increases.

But was the trial court correct in determining whether and in what amount damages were owed under section 1983? The amount of damages was based, as explained above, on a one-page document prepared by John Chamberlain, entitled Costs of Fair Proceedings, and

on his testimony, that a fair rent adjustment proceeding should have cost no more than $2,325 per year. Multiplying that by the three years in question, the total comes to $6,975. That figure, subtracted from the $254,860 that the Galland [sic] actually spent for the three years of rent proceedings, yielded the $247,855 damages figure.

In light of the above discussion, the fallacy of the trial court's method of determining the existence and extent of the supposed substantive due process damages appears evident. Even assuming that the estimated cost of a "fair proceeding" were supported by substantial evidence, the fact remains that not every government action that fails to measure up to the ideal of a fair and efficient rent control proceeding inflicts a constitutional injury. Only those government actions that amount to a deliberate flouting of the law qualify for relief under section 1983 (*Silverman v. Barry, supra,* 845 F.2d at p. 1078), not "inadvertent errors, honest mistakes, agency confusion, [or] negligence" (*ibid.*).[9]

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[9] The dissent, inappropriately analogizing to tort law, opines that the trial court's measure of damages is correct. The dissent then concludes the above discussion is dicta, and the trial court is therefore free to impose on remand the same measure of damages that we here reject. (See dis. opn., *post,* at p. 14.) Not so. We hold that although there may be some section 1983 damages owing based on the substantive due process claim, the trial court's method of calculating them was incorrect for the reasons explained immediately above, and for that reason remand is necessary. Therefore, our conclusion that the trial court was incorrect in its calculation of damages is in no sense dicta, but is necessary to our holding, and on remand the court must follow the deliberate flouting of the law standard discussed in this opinion.

We observe that the determination of allowable increases under a rent control regime is a complicated calculation that often requires the production and analysis of extensive financial data. (See, e.g., *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 193 [mobilehome rent control ordinance includes review of "complex financial and tax data"]; see also Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade* (1983) 35 Rutgers L.Rev. 723, 815 [the requirements that expense and income information for several years accompany individual rent adjustment petitions is inherent in some methods of determining fair return].) Nor is information comparing rental income and other data between mobilehome parks irrelevant to the task of adjusting ~~rent~~ levels. Indeed, the Gallands' own expert at trial used such data to argue that the permitted rental increases had been insufficient. Clovis's inquiries into the financial arrangements between the Gallands, Chamberlain, PMS, and the Rose Trust were also legitimate, allowing Clovis to understand whether certain transactions should be classified as income rather than expenses or investment. Moreover, the fact that some of the requested information proved not to be determinative of the rent regulators' ultimate decision does not establish constitutional injury.

Nor, unlike the building permit cases cited above, is it clear from the record that Clovis abused its authority by refusing to fulfill a clearly established, nondiscretionary duty toward the Gallands. On the contrary, the rate-setting process involves the exercise of considerable discretion and is, as we have recognized, " 'often hopelessly complex.' " (*Kavanau, supra,* 16 Cal.4th at p. 778.)

Moreover, the Gallands themselves were not blameless. As discussed, their attempt at a rent increase in 1985 was rebuffed for failure to specify the cost increases that would justify such an increase, and they were sanctioned for frivolously appealing the trial court's decision. In spite of that fact, and in spite of the fact that the Clovis mobilehome rent control ordinance clearly provides that rent increases were to be justified by evidence of cost increases for such items as "utility rates, property taxes, insurance, advertising, governmental assessments, cost of living increases attributable to incidental services, normal repairs and maintenance, capital improvements," etc. (Ord., § 5-13.06i), the Gallands were initially not forthcoming in providing such specific financial data.

All that being said, we conclude that we need not and should not decide whether any of the many information requests and other administrative requirements that the Gallands contend were arbitrary and burdensome violated their substantive due process rights. Rather, all we decide is that the trial court did not employ the proper standard of gauging constitutional injury. On remand, the court must consider in context, against the overall background of Clovis's dealings with the Gallands, each of the administrative expenses that the Gallands contend inflicted such injury to determine whether any such expenses were imposed in deliberate violation of the law.

In defense of the trial court's decision, the Gallands cite *Birkenfeld, supra,* 17 Cal.3d at page 169. There, we held that one of the necessary components of a constitutional rent control ordinance is that it provide a mechanism to adjust rents to reflect changed conditions

"without a substantially greater incidence and degree of delay than is practically necessary." (*Ibid.*) We invalidated in part an ordinance that failed to contain such a mechanism – it provided no means of across-the-board rental adjustments in a city with more than 20,000 units under rent control, required an apartment-by-apartment consideration with no means by which a landlord could consolidate rent adjustment requests, and precluded the rent board from delegating adjustment hearings to staff. (*Id.* at pp. 169-172.) With such an inadequate mechanism, "many or most rent ceilings would be or become confiscatory." (*Id.* at p. 169.) The Gallands argue in effect that a rent-setting process that falls below the standard suggested in *Birkenfeld* is unconstitutional, and any costs incurred in complying with this substandard process should be recoverable in a section 1983 action.

Birkenfeld, however, is inapposite. There is no claim that Clovis's rent control ordinance is unconstitutional on its face. The issue is not whether Clovis's failure to adjust rents in a timely fashion has led to a confiscatory result – a question we addressed in the previous part of this opinion. Rather, we are concerned in this part with whether the trial court was correct in awarding the Gallands $247,855 in damages resulting from administrative and legal expenditures during the rent-setting process itself. In determining whether a constitutional injury has taken place, we follow the path of the United States Supreme Court and other courts in asking whether government agents have deliberately committed obstructive

and unlawful acts designed to interfere with the Gallands' property rights.[10]

Finally, we note that even if Clovis's actions do not rise to a deliberate flouting of the law, the Gallands are not necessarily without a remedy. As explained above, Clovis cannot in this case arbitrarily exclude the administrative expenses it has imposed on the Gallands in calculating whether they are receiving a fair ROI. Thus, in determining whether a *Kavanau* adjustment is appropriate under the rent control regime in Clovis, the city must consider all such expenses. But administrative expenses can be charged directly to Clovis in the form of section 1983 damages only when the city imposes them in deliberate contravention of the law to obstruct the Gallands' constitutionally based property rights.

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[10] The dissent appears to argue that landlords subject to rent control should be able to sustain a lighter burden in prosecuting a section 1983 action than other civil rights plaintiffs, proving only burdensome or dilatory conduct on the part of the government regulator. There is no basis for such a "landlord exception," nor does the dissent cite any section 1983 case in support of this exception. Alternatively, the dissent argues that the trial court should conclude that Clovis violated the deliberate flouting of the law standard because it failed to allow rent increases without undue burdens, contrary to *Birkenfeld*. For the reasons explained above, the question is not whether the Clovis rent control proceeding as applied to the Gallands conformed to the requirements set forth in *Birkenfeld*, but rather, if there was a lack of conformity, it amounted to ordinary government error or something more egregious amounting to a deliberate flouting of the law. The trial court must make this determination by looking concretely at Clovis's particular actions towards the Gallands.

III. Procedural Due Process

The Gallands also claim that the rent adjustment process was marred by various procedural defects, such as reliance on ex parte materials. Of course, not all breaches of procedural due process by an administrative agency are prejudicial. (*In re La Croix* (1974) 12 Cal.3d 146, 154.) On the other hand, when the process itself is fundamentally unfair, even agency determinations supported by substantial evidence may be overturned; it is the very unfairness of the hearing that undermines the reliability of the administrative record being reviewed. (See *Gates v. Department of Motor Vehicles* (1979) 94 Cal.App.3d 921, 926.) In this case, however, if the procedural due process violations resulted in any injury, it was the identical injury discussed in the first part of our discussion, i.e., lost rents due to partial or complete denials of the 1988, 1989, and 1990 rent increase requests. Remand to the trial court and/or Clovis as outlined above will address this injury.[11]

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[11] Clovis also claims there is no procedural due process violation because the Gallands were afforded an adequate state law postdeprivation remedy, i.e., a writ of mandate under Code of Civil Procedure section 1094.5, that eventually allowed them the requested rent increases. (See *Zinermon, supra*, 494 U.S. at p. 125.) Because we determine there was no independent procedural due process injury, we need not address this question.

IV. Disposition

The judgment of the Court of Appeal is reversed with directions to remand the cause to the trial court for proceedings consistent with this opinion, including remand to the City of Clovis if appropriate.

MOSK, J.

WE CONCUR: GEORGE, C. J.
KENNARD, J.
WERDEGAR, J.
CHIN, J.

CONCURRING AND DISSENTING OPINION BY JONES, J.

The majority holds, and I agree, that Clovis and its rent commission may have violated the Gallands' substantive due process rights, in violation of 42 United State Code section 1983,[1] by subjecting them to an arbitrary and unreasonably burdensome rent adjustment process. Relying on *Silverman v. Barry* (D.C. Cir. 1988) 845 F.2d 1072 and *Roy v. City of Augusta, Maine* (1st Cir. 1983) 712 F.2d 1517, the majority articulates an appropriate substantive due process standard for determining when an

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[1] Section 1983 states, in part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

administrative process is so onerous as to establish constitutional injury. I further agree that it is for the trial court to assess on remand whether and to what extent "Clovis's shifting, costly, and at times ill-considered requests for information," (maj. opn., *ante*, at p. 43) " 'bureaucratic bungling,' " (*id.*, at p. 41) and "unjustifi[ed] delay" (*id.*, at p. 30), establish true governmental abuse of power.

The majority also holds, and I agree, that Clovis and its rent commission may have violated the Gallands' substantive due process rights by denying them a fair rate of return on their property.

However the majority goes on to hold that before the Gallands can state a cause of action for damages under section 1983 for this latter violation, they must first invoke and exhaust a judicially created administrative remedy, which the majority describes as a "*Kavanau* adjustment."[2] (Maj. opn., *ante*, at p. 1.) Under this procedure, the Gallands must return to Clovis and its rent commission and seek, yet again, a future rent increase that is large enough to make up for the government's past refusal to approve rent increases reasonably calculated to provide the Gallands with a fair return on their property. Only after exhausting this administrative remedy and only if the potential rent increase awarded in that process fails to provide the Gallands with a fair rate of return, will they be able to state a cause of action under section 1983. Because I believe that holding violates binding

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[2] The majority labels this a "*Kavanau* adjustment" because it is based on this court's holding in *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761.

authority from the United States Supreme Court, I respectfully dissent. (See *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Section 1983 establishes a federal remedy for persons who believe their federal rights have been violated. The statute is unique because the remedy created by that section exists "independent of any other legal or administrative relief that may be available as a matter of federal or state law." (*Burnett v. Grattan* (1984) 468 U.S. 42, 50.) Acknowledging this unique character, the United States Supreme Court ruled in *Patsy v. Florida Board of Regents* (1982) 457 U.S. 496, 516 (*Patsy*), that "exhaustion of state administrative remedies [is] not . . . required as a prerequisite to bringing an action pursuant to [section] 1983."

The *Patsy* case involved a plaintiff who had filed her section 1983 suit in federal court. Following the *Patsy* decision, it was not clear whether a similar rule applied when a plaintiff filed his section 1983 action in state court. (Compare *Logan v. Southern Cal. Rapid Transit Dist.* (1982) 136 Cal.App.3d 116, 124, with *Bartschi v. Chico Community Memorial Hospital* (1982) 137 Cal.App.3d 502, 508.) That dispute was resolved in *Felder v. Casey* (1988) 487 U.S. 131 (*Felder*), where the issue was whether compliance with a state claim statute could validly be imposed as a prerequisite to a section 1983 action. The United States Supreme Court ruled that it could not. "The question before us today . . . is essentially one of preemption: is the application of the State's notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead " 'stan[d] as an obstacle to the accomplishment and execution of the

full purposes and objectives of Congress' "? [Citations.] Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' [Citation.] Because the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim in asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court." (*Felder, supra,* 487 U.S. at p. 138.)

Following *Felder,* virtually every court that has examined the issue has held that a plaintiff who files a section 1983 suit in state court need not first initiate or exhaust state administrative remedies. That was the ruling of this court in *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 340-341 (*Brosterhous*) ["we may not deny plaintiffs the right to a judicial action for relief in the first instance by imposing a requirement that the plaintiff initiate or exhaust state remedies before filing a section 1983 action"]. And that is also the holding in a host of other cases. (See, e.g., *McDaniel v. Board of Education* (1996) 44 Cal.App.4th 1618, 1622; *Hall v. City of Dothan* (Ala. 1988) 539 So.2d 286, 290; *Diedrich v. City of Ketchikan* (Alaska 1991) 805 P.2d 362, 368-369; *Zeigler v. Kirschner* (Ariz. 1989) 781 P.2d 54, 60; *Arkansas State Medical Bd. v. Leipzig* (Ark. 1989) 770 S.W.2d 661, 662, disapproved on other grounds in *Villines v. Harris* (Ark. 2000) 11 S.W.3d 516,

520, fn. 4; *Patel v. Thomas* (Colo. 1990) 793 P.2d 632, 635; *Miller v. District of Columbia* (D.C. 1991) 587 A.2d 213, 215; *Howlett By and Through Howlett v. Rose* (Fla. 1990) 571 So.2d 29, 30; *Brumage v. Woodsmall* (Iowa 1989) 444 N.W.2d 68, 70; *Earle v. Gunnell* (Md. 1989) 554 A.2d 1256, 1258-1261; *Strictly Pediatrics v. Dev. Hab. Assoc.* (Mo. 1991) 820 S.W.2d 731, 732; *Blackwell v. City of St. Louis* (Mo. 1989) 778 S.W.2d 711, 714; *Gibney v. Toledo Bd. of Educ.* (Ohio 1988) 532 N.E.2d 1300, 1305; *Binkley v. City of Tacoma* (Wash. 1990) 787 P.2d 1366, 1376; *Casteel v. Vaade* (Wis. 1992) 481 N.W.2d 476.) Indeed, the only cases that hold a plaintiff *must* exhaust state administrative remedies before filing a section 1983 suit are those which simply ignore *Felder.* (See *Peterson v. City of Pocatello* (Idaho 1990) 786 P.2d 1136, 1138-1139; *DeCoste v. City of Wahoo* (Neb. 1995) 534 N.W.2d 760, 761.)

The result compelled by *Patsy, Felder,* and *Brosterhous* is clear. Since a party need not exhaust state administrative remedies before filing a section 1983 suit in state court, this court cannot validly require the Gallands to invoke and exhaust a "*Kavanau* adjustment" before pursuing their section 1983 claim.

The majority does not discuss *Patsey, Felder,* or *Brosterhous* or explain why those decisions are inapplicable here. Instead the majority avoids the issue by redefining the problem. Specifically, the majority asserts the "*Kavanau* adjustment" does not "compensat[e] for a substantive due process injury that has already occurred"; rather it "prevent[s] a substantive due process injury from occurring." (Maj. opn., *ante,* at p. 22.) The majority reasons that since a substantive due process injury has

not occurred until the "*Kavanau* adjustment" proves inadequate to cure past confiscatory rent ceilings, there is no section 1983 claim.

I find this analysis unconvincing for two reasons. First, it is contrary to binding precedent from the United States Supreme Court. In *Zinermon v. Burch* (1990) 494 U.S. 113, 125, the court stated clearly that a violation of a party's substantive due process rights is complete and actionable under section 1983 "when the wrongful action is taken." Here the "wrongful action" occurred when Clovis and its rent commission arguably precluded the Gallands from obtaining a fair rate of return on their property. That action is complete and remains complete regardless of whether Clovis and its rent commission are given the opportunity to mitigate the harm they caused by granting the Gallands future rent increases.

Second, as noted above, section 1983 states, in part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . " (Italics added.) I submit that upon the imposition of a constitutionally confiscatory rent ceiling, a right of action exists under the express language of section 1983. No further administrative remedies need be exhausted before a cause of action is stated under section 1983.

The majority also tries to find support for its conclusion in *Kavanau v. Santa Monica Rent Control Bd., supra,* 16 Cal.4th 761. "It would be incongruous," the majority asserts, "for us to conclude, on the one hand, as we did in *Kavanau,* that a landlord permitted adequate rent adjustments has not suffered a constitutional injury under the takings clause, but, on the other hand, that he or she has suffered such an injury under the due process clause." (Maj. opn., *ante,* at p. 23.) I respectfully disagree. For the many reasons cited by Justice Brown in her dissent, *post,* "the *Kavanau* adjustment" cannot supplant section 1983. *Kavanau* applied *takings* jurisprudence to strikingly different factual and procedural circumstances. The *Kavanau* court noted that under well-settled takings law, the benefits a property owner receives in connection with regulatory activity may sometimes offset the burdens imposed by that regulation and thus negate a taking. (*Kavanau, supra,* 16 Cal.4th at p. 782.) The *Kavanau* court extended that principle and held future rent increases could offset a past temporary taking. (*Id.* at p. 783.) While "the *Kavanau* adjustment" may be appropriate to remedy a *takings* claim for imposition of a confiscatory rent ceiling, no such state remedy may be imposed as a prerequisite to a section 1983 claim. As I have explained, *Patsy, Felder,* and *Brosterhous* dictate otherwise.

Finally, the result the majority reaches is unjust under the facts of this case. More than 12 years ago, the Gallands sought a modest rent increase amounting to only pennies per day. Clovis and its rent commission responded by forcing the Gallands into a bloated regulatory process that was "so time consuming, burdensome, and expensive that the potential benefits of participating

in [it] were nonexistent and illusory. . . . "[3] The majority now says that process is still not complete and that the Gallands must return, yet again, to Clovis and its rent commission, "the very . . . officials whose hostility to [their] rights precipitated their injuries." (*Felder, supra,* 487 U.S. at p. 147, fn. omitted.) I believe that result is unauthorized and unjust. Accordingly, I dissent.

JONES, J.*

DISSENTING OPINION BY BROWN, J.

In this case, we decide whether and in what circumstances 42 United States Code section 1983 (section 1983) provides a remedy for an unconstitutional and confiscatory restraint on prices – an issue the United States Supreme Court has not definitively resolved. The majority holds that, before a plaintiff may obtain damages under section 1983, he or she must first exhaust administrative remedies by seeking regulatory relief from the same agency that imposed the confiscatory price regulations in the first place. Moreover, this exhaustion requirement applies even where unfairness in the administrative hearing process was the source of the constitutional

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[3] The trial court expressly ruled that Clovis and its rent commission violated the Gallands' due process rights by, among other things, "making the rent review process so time consuming, burdensome and expensive that the potential benefits of participating in the process were nonexistent and illusory. . . . "

*Presiding Justice, Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

injury. This conclusion directly contravenes *Patsy v. Florida Board of Regents* (1982) 457 U.S. 496 (*Patsy*), an inconsistency that is only explainable in terms of the reduced importance the majority gives to the constitutional interest that is at stake. Thus, in the latest of a series of decisions rejecting the claims of property owners, this court now refuses to enforce federal civil rights remedies when it comes to confiscatory regulations. I respectfully dissent.

Introduction

Sometimes, whether because of bias, incompetence, political expediency, bureaucratic malice, or some combination of oppressive practices, administrative agencies prove themselves incapable of regulating private affairs in a way that comports with fundamental justice. The City of Clovis (Clovis) subjected the Gallands to a rent adjustment procedure that was so "time-consuming, burdensome, and expensive" as to deprive them of due process of law. Frustrated by the patent unfairness of this administrative process, they sought recourse from the courts, and the trial court, recognizing the gross injustice that had occurred, awarded the Gallands compensation. The Court of Appeal affirmed. We now intervene to eviscerate a federal civil rights remedy whose very purpose is to provide an alternative to abusive or corrupt state adjudicative procedures like those the Gallands had to endure and to announce a new due process standard that has never applied to rent control.

It is long settled that a rent control scheme is confiscatory and violates due process if it is not "capable of

providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 169 (*Birkenfeld*).) The majority rejects this standard, noting that *Birkenfeld* involved a facial challenge to a rent control scheme, whereas the Gallands are seeking "damages resulting from . . . the rent-setting process itself." (Maj. opn., *ante*, at p. 46.) But if a rent control scheme is unconstitutional on its face for failing to provide a streamlined rent adjustment procedure, then it is all the more unconstitutional when a concrete factual record establishes the scheme's inefficiency and inadequacy in practice. Surely, if Clovis had adopted regulations outlining all the convolutions of the rent adjustment procedure it imposed on the Gallands, including the unexplained delays and shifting demands for information, then those regulations would have been facially unconstitutional under *Birkenfeld*. The fact that Clovis kept its arcane procedures secret, even seeming to make them up as it went along, certainly does not militate a different conclusion in Clovis's favor.

Clovis said to the Gallands, in effect: Before you can raise rents, you must prove you're not making too big a profit, and we will make it impossible, as a practical matter, for you to meet this burden of proof. The Gallands responded to Clovis's regulatory arrogance in much the same way as Lewis Carroll's Alice did when she found herself in a similar situation: " 'I don't think they play at all fairly,' Alice began, in rather a complaining tone, ' . . . and they don't seem to have any rules in particular; at least, if there are, nobody attends to them – and you've no idea how confusing it is. . . . ' " (Carroll,

Alice's Adventures in Wonderland (1985 ed.) p. 115.) To which the majority replies: Go back and try again.

The "*Kavanau* Adjustment" Does Not Supplant Section 1983

In *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 782 (*Kavanau*), this court held that future rent adjustments can compensate for past confiscatory rents, thus dispelling any due process violation that may have occurred in that case and making it unnecessary for us to decide whether a due process violation constitutes a per se taking requiring just compensation under the state and federal takings clauses. The majority now extends *Kavanau* far beyond its original modest scope, concluding, in a very different factual context, that the possibility of future rent adjustments precludes a section 1983 action. (Maj. opn., *ante*, at p. 25.)

The differences between this case and *Kavanau* are manifest. First, *Kavanau* involved a highly idiosyncratic fact pattern. In that case, Earl Kavanau had challenged the constitutionality of a 12 percent per year cap on rent increases. The cap did not prevent landlords from imposing very large rent increases, but it required those rent increases to be phased in over a number of years. That regulation was relatively modest as compared to the obstructionist practices of Clovis in this case. Nevertheless, a lower court had found that the 12 percent cap violated due process and that judgment was final. We had before us Kavanau's subsequent takings claim based on the time period during which the 12 percent cap was in effect. The *Kavanau* majority did not believe that the 12

percent cap constituted an actual due process violation or a taking (*Kavanau, supra,* 16 Cal.4th at pp. 779-781), but needed to address Kavanau's argument that the previous judgment in his favor entitled him automatically to a finding of a taking requiring just compensation. (*Id.* at p. 781.) In short, we needed to determine the effect in takings law of a due process judgment that we thought was wrong. In that unusual and convoluted context, the *Kavanau* majority reasoned that the relatively minor, if any, confiscation that may have occurred as a result of the due process violation could easily be dispelled through future rent adjustments, and therefore a takings clause remedy was inappropriate. It is one thing to reach the conclusion we reached in *Kavanau* that future rent adjustments can dispel a minor (or nonexistent) due process violation and thus obviate a related takings claim. It is quite another thing to extend that same conclusion to all due process violations, no matter what their scope or procedural posture.

Second, *Kavanau* was based on circumstances unique to takings jurisprudence. For example, we noted that under established takings law a court must consider the " 'reciprocity of advantage' " that a party receives from a regulation of property before determining that a taking has occurred. (*Kavanau, supra,* 16 Cal.4th at p. 782.) In light of that principle, the *Kavanau* majority concluded that the possibility of future rent adjustments was a potential benefit that negated Kavanau's takings claim, at least at the stage of the proceeding that was then before us. No similar " 'reciprocity of advantage' " (*ibid.*) principle applies under the due process clause. In this sense,

our decision reflected principles of takings law that simply do not apply here.

Third, in *Kavanau* we made a specific finding that the rent control scheme at issue in that case was sufficiently flexible to allow the agency to take past confiscatory rent levels into account when setting future rent levels. (*Kavanau, supra,* 16 Cal.4th at p. 784.) The majority makes no similar finding here.

Fourth, *Kavanau* was not a case in which the agency's ability to provide a fair rent adjustment procedure was brought into question. Rather, the agency had merely enforced a 12 percent cap that turned out to be confiscatory. Here, on the other hand, flaws in Clovis's rent adjustment mechanism are the very basis of the due process claim. In this circumstance, it defies logic to impose the remedy of further rent adjustment proceedings. Further administrative proceedings cannot possibly compensate for an injury caused by excessive administrative proceedings. In *Kavanau,* we acknowledged that the remedy of future rent adjustments might prove to be inadequate, in which case other remedies would be appropriate. (*Kavanau, supra,* 16 Cal.4th at pp. 782-783.) Here, the remedy of future rent adjustments is inadequate as a matter of law in light of Clovis's past conduct.

Finally, and most importantly, *Kavanau* did not involve a section 1983 claim. Section 1983 arose out of the sad failure of southern states in the aftermath of the Civil War to enforce the federal Constitution and protect basic civil rights. (*Wilson v. Garcia* (1985) 471 U.S. 261, 276-277.) A long series of high court precedents have bolstered the section 1983 remedy, precedents the majority would no

doubt vigorously defend. The thrust of these decisions is that, far from relegating plaintiffs to the same corrupt system that inflicted their injury, section 1983 exists to give plaintiffs an adjudicative alternative that will ensure protection of their rights. (See, e.g., *Zinermon v. Burch* (1990) 494 U.S. 113, 124-125; *Felder v. Casey* (1987) 487 U.S. 131, 147-148 (*Felder*); *Patsy, supra*, 457 U.S. at pp. 502-507.) Therefore, as the high court stated in *Felder* at page 147, "there is simply no reason to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights . . . could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries." The majority can only avoid the clear instruction of these precedents if it can somehow find that no constitutional violation occurred here. Thus, in a formidable example of judicial sleight of hand, the majority argues, in effect, that a due process violation is not a due process violation. The majority reasons, by analogy to *Kavanau*, that there may be no due process violation when rents are averaged over a number of years. (Maj. opn., *ante*, at pp. 22-25.) Therefore, even if there is a manifest due process violation during a particular year (or even a series of years), that due process violation may disappear when future years are taken into consideration. Now you see it; now you don't.

The majority's interpretation of due process law is in error. It is true that, *after the fact*, a regulatory scheme may prove nonconfiscatory when the returns in a few years are averaged together, but that concession is very different from holding that in a particular confiscatory year (or after a series of confiscatory years) an investor may not

pursue federal remedies and instead must wait and hope that the confiscatory regulations will be sufficiently relaxed in the future to make up the difference. How long must the investor wait? The Gallands have so far had to wait almost 13 years, and the majority tells them to keep on waiting. Certainly, if we infinitely expand the number of years that may be averaged together, there is always the possibility that future rent adjustments will compensate for past confiscatory rent levels. Must a business enterprise prove it is on the verge of bankruptcy before it can obtain relief? Even then, would the majority deny relief, arguing the business was undercapitalized? In effect, the majority holds that investors must bear the brunt of a confiscatory regulation by providing a business with sufficient capital to survive a series of lean years. But constitutional protections should not (and do not) prefer large business enterprises over small ones.

I doubt the majority would be so quick to eviscerate section 1983 in a classic civil rights case. Suppose a Black firefighter were denied promotions and raises in a city with a long history of discrimination against Blacks, and the trial court awarded damages under section 1983. Would this court reverse and tell the firefighter: You have no remedy under section 1983; instead, you have to go back to the city and petition for extra promotions and raises that will diffuse the incipient constitutional violation? Or, to make the comparison to this case more precise, what if a city discriminated against a Black-owned business in the award of city contracts? Assuming the business was sufficiently capitalized to survive a series of lean years, would we deny a section 1983 claim and tell the business to petition for extralucrative contracts in the

future to " 'dispel[ ]' " the past discrimination? (Maj. opn., *ante*, at p. 23.) It is no answer to say that this case concerns merely an economic injury and that race is a "suspect class" requiring different treatment under the Constitution from price regulation. (*Id.* at pp. 23-24, fn. 3.) Arbitrary and unfair treatment by the government is not merely an economic injury; it is also, like race discrimination, an affront to personal dignity. While the standards for finding a constitutional violation may differ, the Constitution does not establish a hierarchy of rights in which some are deemed more worthy of protection than others.

Moreover, as the race discrimination examples illustrate, what is essentially an exhaustion requirement cannot be disguised by the simple trick of redefining the constitutional right so no violation occurs until after administrative remedies have been exhausted. To do so would render the holding in *Patsy* meaningless. Here, for example, the administrative adjustment of future rents is unquestionably remedial, not preventive. It follows a judicial finding that the administrative agency's rates are "confiscatory" (maj. opn., *ante*, at pp. 1, 22, 25, 29-31), and its express purpose is to "compensate" (*id.* at pp. 1, 19, 23, 31) for the confiscation, thereby ensuring a fair return on investment. Moreover, in light of the intervention of a reviewing court, the adjustment of future rents cannot be characterized merely as an ordinary part of the rate-setting process. Not surprisingly, in *Kavanau* we expressly referred to this adjustment as a "remedy." (*Kavanau*, *supra*, 16 Cal.4th at pp. 767, 782-786.) Indeed, the only reason to characterize it in other terms is to avoid the mandate of *Patsy*. Perhaps conscious of the weakness of its conclusion in this regard, the majority euphemistically

refers to this remedy as the "*Kavanau* adjustment" (maj. opn., *ante*, at p. 1), though the majority concedes it is really a "remedy." (*Id.* at pp. 22, 25, 31, 47.)

But whether we use the term adjustment or remedy, a fair resolution of a constitutional breach cannot include sending an aggrieved party back to the same administrative system that caused the injury in the first place. On the contrary, the driving purpose of section 1983 is to get the plaintiff out of the corrupt state system where constitutional rights are being violated and into federal court where wrongs can be fairly redressed. (*Patsy, supra,* 457 U.S. at pp. 503-505.) Although the Gallands have opted to pursue their section 1983 claim in state court, the principle no less applies. (*Felder, supra,* 487 U.S. at p. 147.) The essence of section 1983 is to liberate a plaintiff from an abusive adjudicative mechanism, which Clovis's rent adjustment procedure has unquestionably proved itself to be. "A state law that conditions th[e] right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of [section 1983], is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law." (*Felder, supra,* 487 U.S. at p. 153.) Thus, instead of the judicial oversight that section 1983 was intended to afford, we now have judicial abdication, while plaintiffs are left to grind away at the state administrative level.

Moreover, the remedy of adjusting future rents is unfair in its operation, except perhaps in a case like *Kavanau* where the due process violation is negligible or nonexistent. Here, it is Clovis that violated due process, not the tenants, and Clovis should pay the damages. This

is particularly true, because the source of the violation was in large part the imposition of excessive procedural costs that did not benefit the tenants. (Cf. *Kavanau, supra,* 16 Cal.4th at p. 784 [finding it appropriate for tenants who benefited from unconstitutionally low rents to bear the burden of the remedy].) Unless we place the burden of the remedy on Clovis, we create no disincentive to prevent the sort of regulatory abuse that occurred here. Under the majority's opinion, a city, when regulating economic affairs, is pretty much free to disregard the due process rights of politically disfavored parties, and if questioned on this behavior – which may never happen, considering the extraordinary efforts the Gallands had to exert in order to finally get a fair hearing – the city merely has to ease up on its regulations. Moreover, if the regulations continue to be confiscatory, which is not unlikely in light of the political forces that gave rise to the initial confiscation, it is "déjà vu all over again." (Araiza et al., *The Jurisprudence of Yogi Berra* (1997) 46 Emory L.J. 697, 714.) The aggrieved party is back to square one, with more lengthy and burdensome administrative proceedings, more writ petitions, and more appeals.

Thus, under the majority view, landlords now have to win twice, first proving in court that the rent control scheme was confiscatory, then proving in a second court proceeding that the regulatory relief offered by the agency was inadequate. Meanwhile, new claims may well arise while prior claims are being adjudicated, remedied, and then readjudicated. The claims cannot be resolved as fast as they arise, creating a sort of "feedback loop" in which justice for landlords is the ever-receding dream. In this case, for example, we have dipped into a 13-year-old

proceeding, made some solemn pronouncements, and then turned our attention to other matters, but for the Gallands, it is a quest for justice that will never end.

All of these concerns lead me to wonder if we took the wrong turn long ago when we began treating rent control like any other price-regulated industry. The result of that decision has been to obscure injustices that may not arise in the context of utility rate regulation but do arise where regulations affect private transactions in residential property. Landlords are not producers of a commodity, they are owners of real estate, and the state's action in enforcing rent control looks much more like an exercise of the sovereign's power of eminent domain than an exercise of its police power. In short, the unique issues that arise in the context of real estate warrant unique treatment of rent control under the Constitution. While it may be too late to change direction at this point, we should at least exercise the caution of magistrates and conserve what we can of constitutional constraints.

The Substantive Due Process Standard

Having found no confiscation, the majority turns to whether the " 'bureaucratic bungling' " (maj. opn., *ante*, at p. 41) that occurred here independently constituted a violation of substantive due process. The majority weighs various substantive due process standards, including " 'arbitrary' " (*id.* at p. 33), " 'shocks the conscience' " (*id.* at p. 34, italics omitted), and "outrageous or egregious" (*id.* at p. 35), but finally settles on " 'a deliberate flouting

of the law' " (*id.* at p. 38, italics omitted) as the appropriate verbal formulation. In so doing, the majority unnecessarily complicates the question before us. These various standards may be valid, but they are all subsumed within the more specific standards that apply in the context of price regulation (see, e.g., *Power Comm'n v. Hope Gas Co.* (1944) 320 U.S. 591, 602-603 (*Hope Gas*); *Power Comm'n v. Pipeline Co.* (1942) 315 U.S. 575, 584-585), including the standard we articulated in *Birkenfeld* that a rent adjustment mechanism may not be prohibitively burdensome (*Birkenfeld, supra,* 17 Cal.3d at p. 171) or fraught with "a substantially greater incidence and degree of delay than is practically necessary." (*Id.* at p. 169.) Putting the point another way, a rent adjustment mechanism that does not satisfy *Birkenfeld* is by definition a deliberate flouting of the law in violation of due process – the law in question being the constitutional right of investors to a fair return. In this regard, it is also worth noting that Clovis had ample opportunity to reflect upon its decisions, and therefore, as the majority concedes (maj. opn., *ante,* at p. 35), it is held to a stricter standard under the due process clause.

The majority's casual sidestepping of *Birkenfeld* flows, I think, from a basic conceptual error. The majority divides the Gallands' right to relief into categories based on the damages the trial court awarded. Thus, the majority treats the allegation that the rent control scheme was confiscatory separately from the allegation that the rent adjustment procedure was unfair. But *Birkenfeld* holds that an unfair, burdensome, and slow rent adjustment procedure is one of many ways a rent control scheme can *be* confiscatory. (*Birkenfeld, supra,* 17 Cal.3d at pp. 169-171;

see also maj. opn., *ante*, at p. 47.) Moreover, the costs associated with such a rent adjustment procedure are one of the operating expenses that the regulatory agency must take into consideration when determining fair return. (Maj. opn., *ante*, at pp. 28-29, 47.)

In short, the majority's categories collapse into one another. We do not have before us a trial court finding of two separate injuries for which we must articulate separate legal standards. Rather, we have before us a single finding that Clovis's unfair, burdensome, and slow rent adjustment procedure rendered the rent control scheme confiscatory both by increasing the Gallands' costs and by preventing or delaying meritorious rent increases. Pursuant to this one finding, the Gallands were entitled to recover the high costs they incurred complying with the unfair procedure and also the additional amount necessary to bring their actual return on investment up to the level of a "fair return" (maj. opn., *ante*, at p. 19), and this remedy is what the trial court awarded.

Having unnecessarily divided the Gallands' right to relief into categories, the majority addresses Clovis's abusive rent adjustment procedure without reference to price regulation cases such as *Birkenfeld*, relying instead on substantive due process standards that fit this case imperfectly (maj. opn., *ante*, at pp. 33-40) and the law governing administrative subpoenas. (*Id.* at p. 42.) The majority then compounds its error by articulating a new "prospective rule" requiring writ proceedings to remedy any future abuses in rent adjustment processes. (*Ibid.*) This prospective rule, like the rule requiring the Gallands to pursue future rent adjustments to remedy past confiscatory rent regulation, conflicts with *Patsy*, *supra*, 457 U.S. 496, by

forcing the victims of a constitutional breach to exhaust state law remedies prior to pursuing section 1983 remedies.

Further Proceedings After Remand

Finally, I offer a few comments so that the error of the majority opinion is not further compounded after remand. The majority does not in principle bar recovery of all the amounts the trial court awarded, including costs associated with Clovis's unfair rent adjustment procedure, lost rental income (to the extent rents did not provide a fair return), prejudgment interest, postjudgment interest, and costs and fees associated with the judicial proceedings. All these losses are theoretically recoverable under the majority's opinion if adequately proved. The majority merely holds that the trial court must apply the deliberate flouting-of-the-law standard and that lost rental income (including associated interest) must be recovered through future rent adjustments.

Significantly, the majority's rule requiring writ proceedings to remedy future abuses in rent adjustment procedures (maj. opn., *ante*, at p. 42) is *prospective* only. Therefore, the trial court in this case can still award section 1983 damages, interest, and attorney fees if it concludes Clovis's unfair rent adjustment procedure deliberately flouted the law (maj. opn., *ante*, at p. 47), which I think it did – the law in question being the constitutional right to a rent adjustment procedure that is not prohibitively burdensome or fraught with unreasonable delays. (*Birkenfeld, supra*, 17 Cal.3d at pp. 169-171.) In this regard, we must consider that the rent adjustment

procedure at issue here cost significantly more than the rent increases the Gallands were seeking, and its costs are still mounting. Because these costs can be passed through to tenants (maj. opn., *ante*, at pp. 28-29, 47), Clovis's actions merely generated future rent increases bigger than the ones under consideration. That sort of senseless regulatory conduct can only be explained as a deliberate flouting of the law, and an award of section 1983 damages is appropriate. Having won compensation for the high cost of the rent adjustment procedure, the Gallands can then petition for future rent increases that will not only assure a fair return in the year of the petition but also fully compensate them (including interest if necessary) for lost income resulting from the confiscatory rent ceilings the trial court already identified.

The majority discusses flaws it perceives in the trial court's measure of damages (maj. opn., *ante*, at pp. 42-45), arguing that a rent adjustment procedure may be inefficient and expensive without being unconstitutional, and therefore damages should not be determined by comparison to the cost of an ideal procedure. (*Id.* at p. 43.) First, I note Clovis did not raise this issue in its petition for review. Furthermore, all this discussion is, in a sense, beside the point. The Gallands are entitled under the Constitution to a fair return over and above their costs, *including the cost of the unfair rent adjustment procedure.* (*Id.* at pp. 28-29, 47.) Therefore, whatever portion of this cost they do not recover as a damage award, they can recover through future rent adjustments. (*Id.* at p. 47.)

Moreover, I think the majority is wrong as a legal matter to limit damages as it does. The exacting constitutional standard for establishing a due process violation

should not serve to restrict damages once the high threshold is met. Rather, once the threshold is met, damages should be sufficient to compensate the plaintiff fully for the constitutional wrong, as well as to create the appropriate disincentive for the state. Would the majority argue in a tort case that the damages for negligence are not the full amount necessary to compensate the plaintiff for the injury, but rather some discounted amount that accounts for injuries the defendant might have inflicted without acting negligently? Obviously not. Accordingly, I think the difference between the actual cost of the unconstitutional proceeding and the projected cost of a reasonably efficient proceeding was an appropriate measure of economic damages for the trial court to apply. Because the issue was not raised in the petition for review and in light of the majority's decision to remand on the question of liability (maj. opn., *ante*, at p. 45), I take its discussion of the measure of damages (*id.* at pp. 42-45) to be dictum, despite the majority's assertions to the contrary. (*Id.* at p. 43, fn. 9.) I do not see how the majority can remand on the question of liability and nevertheless have its discussion of damages be "necessary to [its] holding." (*Id.* at pp. 43-44, fn. 9.)

The majority also questions the trial court's assumption that 20 to 25 percent per year represented a fair return in this case. (Maj. opn., *ante*, at pp. 26-28.) While much of this discussion is valid, I disagree that a confiscatory taking occurs " 'only when the owner has been deprived of substantially all reasonable use of the property.' " (*Id.* at p. 27, quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 686.) That statement has been repudiated by subsequent decisions of the high court, as well as this

court. (See, e.g., *Kavanau, supra,* 16 Cal.4th at p. 774.) Moreover, even for a regulated industry, a return of 20 to 25 percent is not per se excessive. Rather, it may be appropriate if the business enterprise is particularly risky or a high return is otherwise necessary to attract capital. (*Hope Gas, supra,* 320 U.S. at p. 603.) A seemingly high return may also be appropriate if, as occurred here, the trial court defines initial investment as down payment absent borrowed capital, rather than as total investment from all sources. On the other hand, a return matching the return of readily available certificates of deposit would presumably be confiscatory, because it would not compensate investors for the comparatively greater uncertainty, aggravation, and lack of liquidity associated with renting residential property. Because of these complexities, I would defer to the trial court's resolution of this factual question.

Finally, I think it important to emphasize that Clovis must change its behavior or risk an even larger damage award. If, in the course of future rent adjustment proceedings, Clovis continues to interpose unfair procedural obstacles or does not permit adequate rent increases to assure a return that will offset any confiscatory returns the Gallands already suffered (including, if necessary, interest), or if market forces will not permit the Gallands to recoup their losses within a reasonable period of time, they can return to the courts and allege both section 1983 and takings claims. (Maj. opn., *ante,* at p. 30; see also *Kavanau, supra,* 16 Cal.4th at pp. 782-783, 785.)

Conclusion

Section 1983 is supposed to stand as "a guarantor of the basic federal rights of individuals against incursions by state power." (*Patsy, supra,* 457 U.S. at p. 503.) The real mischief of the majority's opinion lies in its disparate treatment of property rights when enforcing section 1983. Fair and nonconfiscatory price regulation is not such a slippery thing that it should be subject to vastly different treatment from other constitutional values. The Constitution bespeaks no hierarchy of rights, no preferences with respect to its constraints on government action, no partiality among its protections of liberty. Nevertheless, today's majority consigns economic rights to a secondary status that can only reflect opposition to the balance the framers carefully struck between public and private power.

BROWN, J.

IN THE SUPREME COURT OF CALIFORNIA

ROGER GALLAND et al., Plaintiffs and Respondents, v. CITY OF CLOVIS et al., Defendants and Appellants.	S080670 Ct.App. 5 F025257 Fresno County Super. Ct. No. 418831-4 ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT] (Filed Mar. 21, 2001)

BY THE COURT:

The opinion herein, appearing at 24 Cal.4th 1003, is modified as follows:

The last sentence of the full paragraph at 24 Cal.4th at page 1029 is modified by changing the words "file a" to "pursue their," so that the sentence reads as follows: "If, however, a *Kavanau* adjustment proves to be inadequate in this case to reestablish an average reasonable rate of return, then the Gallands would be free to pursue their section 1983 action on the grounds that state equitable remedies have failed to prevent the constitutional injury from occurring."

The modification does not affect the judgment.

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ROGER GALLAND et al., Plaintiffs and Respondents, v. CITY OF CLOVIS et al., Defendants and Appellants.	F025257 (Super. Ct. No. 418831-4) **OPINION** (Filed June 7, 1999)

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Kerkorian, Judge.

Lozano, Smith, Smith, Woliver & Behrens, Thomas J. Riggs, Jerome M. Behrens and David J. Wolfe for Defendants and Appellants.

Worthington & Worthington and Jaquelynn C. Pope for Plaintiffs and Respondents.

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Roger and Virginia Galland own a mobilehome park in Clovis that is subject to rent control. The Clovis Rent

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of FACTS and parts 1.-3. of DISCUSSION.

Review Commission and Clovis City Council (collectively Clovis) denied or permitted only a portion of the proposed rent increases in 1988, 1989 and 1990. The Gallands filed this action to overturn the rent decisions (Code Civ. Proc., § 1094.5 (section 1094.5)), and for damages for violations of their due process rights (42 U.S.C. § 1983 (section 1983)).

The trial court found that Clovis's application of the ordinance resulted in a rent review process that was unfair and so burdensome and expensive that it violated the Gallands' procedural and substantive due process rights and deprived them of a fair return on their regulated property. The court concluded that remand under section 1094.5 was an inadequate remedy; it dismissed the administrative proceedings and awarded damages of $1,019,261.50 under section 1983. The damages included an amount for rent lost during the period of 1988 through March 31, 1995.

Clovis appeals, contending that any error involved procedural, not substantive, due process rights and the proper remedy is remand for lawful rent review hearings pursuant to section 1094.5 rather than an award of damages under section 1983. We conclude the Gallands were deprived of both procedural and substantive due process rights and the trial court did not abuse its discretion in dismissing the administrative proceedings and awarding damages pursuant to section 1983. Further, *Kavanau* v. *Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761 (*Kavanau*), decided while this appeal was pending, does not compel reversal of the award of lost rent damages against Clovis. We therefore affirm.

FACTS*

The Gallands, residents of Utah, purchased The Woods Mobile Country Club (the Woods or park) in 1978. The Woods is a 260-space, upscale mobilehome park with numerous amenities. The Gallands hired Planned Management Services (PMS), a Utah corporation which manages mobilehome parks in a number of states, to manage the Woods. John Chamberlain, the president of PMS, has managed the Woods and acted as the Gallands' representative in the rent review proceedings since 1978. PMS's compensation is based on a percentage of the earnings of the Woods.

The Ordinance

The Mobile Home Rent Review and Stabilization Ordinance, chapter 13, Clovis Municipal Code section 5-13.01 et seq. (Ordinance) enacted in 1978 (repealed in 1993) was intended to protect mobilehome park tenants from unreasonable rent increases while recognizing the need of mobilehome park owners to receive rent increases sufficient to cover increased costs and to generate a "fair return on their investment." (Ordinance, § 5-13.01.) The Ordinance provided that on the filing of a petition signed by more than 50 percent of the tenants of a mobilehome park, the Clovis Mobile Home Rent Review Commission (Commission) would review the rent increase and determine whether it was "so great as to be an unreasonable increase." (Ordinance, § 5-13.06(b).) The park owner had the burden to prove by a preponderance

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* See footnote, *ante*, page 1.

of the evidence that the rent increase was reasonable in light of the nonexclusive factors enumerated in Ordinance section 5-13.06(i). Those factors included utility rates, property taxes, insurance, advertising, cost-of-living increases attributable to incidental services, repairs and maintenance, capital improvements, amenity and service upgrades, fair rate of return on investment, and increased property values. The Ordinance provided that Commission decisions could be appealed to the Clovis City Council within 15 days after the final written decision was mailed to the parties.

Prior Proceedings

In 1983, the Gallands challenged the constitutionality of the Ordinance and a decision by the Commission permitting only a portion of a noticed rent increase. This court upheld the constitutionality of the Ordinance and the Commission's rent decision. In 1985, the Gallands (by PMS and Mr. Chamberlain) again challenged a Commission decision permitting less than the noticed rent increase. The trial court rejected their contentions, and this court affirmed in an unpublished opinion that sanctioned PMS for a frivolous appeal.

The Challenged Rent Review Proceedings

1988 Rent Increase

The Gallands noticed a $6 a space rent increase effective April 1, 1988, which raised the monthly rent to $275. The tenants petitioned the Commission to review the

matter. Mr. Chamberlain asked what materials and information the Commission would like produced. The city clerk responded that Clovis would provide that information, but set the matter for hearing without specifying what information to submit.

Mr. Chamberlain submitted a letter stating that the rent increase was less than half the increase in the consumer price index (CPI). Park expenses had increased $46,000 in the last year and cash flow in constant dollars had fallen $10,275 since 1986 and $30,000 since 1984. Ray Wyland, the president of the Woods tenant association, responded that the CPI included increases for items other than housing, Mr. Chamberlain had not specified which expenses had increased, and the Woods' rent had increased from $143 in 1978 or 1979 to $269 in 1987.

In response, Clovis requested that Mr. Chamberlain provide a copy of the CPI and documentation demonstrating the increased expenses and decreased cash flow.

Mr. Chamberlain submitted several applicable CPIs and prepared tables setting forth the Woods' receipts, disbursements and pre-tax cash flows for 1984 through 1987. The tables showed that expenses had increased more than income resulting in diminishing cash flows. Mr. Chamberlain also prepared a table showing the Gallands' return on investment (ROI) for the years 1984 through 1987. The average ROI for the Woods for the past 10 years was 13.47 percent. The return on corporate bonds for the same period was 12.47 percent. Mr. Chamberlain stated that because real estate is a higher risk, non-liquid investment, it requires a higher rate of return than bonds. The 1987 ROI for the Woods was between

11.29 and 14.62 percent depending on how the figures were adjusted for inflation.

The Commission heard the matter on April 13, 1988. In addition to Mr. Chamberlain, the Gallands' accountant, certified public accountant Richard Miranda, testified that regardless of the CPI used, cash flows had decreased over the last four years. During that period, income had increased 10.8 percent while expenses had increased 18.3 percent. The tenants argued the rent should not be increased because the Woods rent was already one of the highest in Fresno County.

The matter was continued with the consent of the parties to April 29, 1988, to provide the commissioners additional time to digest the materials presented. In the interim, the Commission asked the Gallands to provide substantial additional information by April 26, 1988. That information included further breakdowns and explanations for various expenditures, information on vacancies and cash flow for the prior nine years, and additional information and calculations related to ROI. Mr. Chamberlain provided much, but not all of the information requested. He felt that some of the requested information was irrelevant and other materials could not be gathered in the short amount of time provided to do so.

At the completion of the continued hearing on April 29, 1988, the Commission voted three to two that no increase was justified.

The Commission issued draft findings and decision denying the rent increase. The Gallands objected to the

decision on various grounds including that the Commission had relied on information not presented at the hearing. The Commission met on May 13, 1988, to consider the draft findings. The commissioners expressed difficulty in determining a fair ROI based on the evidence before them. The hearing was continued one week.

On May 20, the commissioners reiterated their decision that no increase was warranted. They justified the decision, in part, on a portion of Mr. Chamberlain's testimony in the 1985 rent review proceedings regarding fair ROI, which they misconstrued to support their conclusion that the current rent provided a fair ROI. The Commission had not notified the parties it would consider evidence from earlier proceedings. The Commission issued its final decision on June 3, 1988, finding three to two that the Gallands had not demonstrated by a preponderance of the evidence that any rent increase was justified.

The Gallands appealed the decision to the city council which set the matter for hearing on July 18, 1988. The Gallands challenged the Commission's findings and decision, and the fairness of the proceedings. After hearing from both parties, the city council decided the Gallands had not provided sufficient information to enable the council or the Commission to make an intelligent decision regarding a fair rate of return for the Woods. The council remanded the matter to the Commission for further proceedings and ordered the Gallands to provide extensive accounting materials and financial documents which the Commission would consider in determining a fair rate of return.

The information requested included audited financial statements for the past 10 years showing assets, liabilities, the Gallands' equity, the ratio of debt to equity and the results of operations; and highs, lows, averages and ranges of the rates of ROI for each of the other mobilehome parks managed by PMS since 1978. The council also instructed the parties that any adjustment for inflation should be based on the U.S. Shelter Index.

The Gallands objected to producing some of the information requested because it was extremely costly and time consuming to obtain and prepare. The 10-year audit would cost approximately $75,000 and would take two to three months to complete. Further, the financial information on the other mobilehome parks was confidential and PMS could not disclose the data without the permission of the owners. Mr. Chamberlain and the tenants' attorney met with Clovis officials and reached a compromise regarding the additional materials to present, which reduced the Gallands' burden somewhat.

On October 17, 1988, the Gallands submitted extensive materials in response to the council's order. The submissions include information in narrative and table format from 16 other mobilehome parks that PMS managed. The data indicated that the average ROI in constant dollars for the parks was 21.7 percent compared to the Woods' average of 11.9 percent. Regarding vacancy rates over the past 10 years, the Woods averaged a 2.1 percent vacancy rate while other mobilehome parks in Fresno and Clovis averaged a 5.03 percent rate. Regarding fair rate of return on the Woods and similar investments, the Gallands submitted a 19-page discussion of various types of

investments, their attendant risks and their expected return.

The Gallands also submitted declarations from two experts. Accountant Miranda declared that the financial records from which the Gallands' figures were taken were accurate. Chapman Findlay, Ph.D., former chairman of the Department of Finance and Business Economics at the University of Southern California, provided an opinion regarding the fair rate of ROI for the Woods. He compared the expected return for various types of investments and, based on the comparisons, opined that a fair rate of return for the Woods measured before tax on equity was 25 percent.

The tenants submitted a declaration from their expert Richard Nordstrom, Ph.D., a professor at California State University, Fresno. Dr. Nordstrom stated that the Woods' rents and profits since 1978 had increased at a greater rate than the CPI. His calculations, which compared the Gallands' return after debt service with their actual investment not adjusted for inflation, indicated the Gallands received a 24.9 percent ROI in 1987.

At the Commission hearing on December 16, 1988, the commissioners grappled with defining the "investment" for purposes of calculating fair ROI. Dr. Nordstrom testified return should be calculated on actual dollars invested with no adjustment for inflation. Dr. Findlay stated, albeit in a garbled fashion, that investment dollars must be adjusted for inflation.

The Commission concluded the Gallands were receiving a fair ROI and had not justified the rent increase. The commissioners reasoned that Dr. Findlay

was of the opinion that a 25 percent ROI was fair. By Dr. Nordstrom's calculations (using figures not adjusted for inflation), the Gallands received a 24.9 percent ROI in 1987. The Commission also found that both experts had calculated rate of ROI *without* adjusting the initial investment for inflation.

The Gallands appealed the decision to the city council, pointing out that Dr. Findlay's calculations had adjusted the initial investment for inflation. The city council heard the appeal on March 3, 1989. The council agreed that the historical investment was the proper figure to use in calculating ROI and affirmed the decision of the Commission. On March 29, 1989, the Gallands requested that Clovis prepare a record of the 1988 rent review proceedings pursuant to section 1094.6.

1989 Rent Increase

In 1989, the Gallands noticed an $18 a month rent increase effective April 1, 1989. On February 14, 1989, the tenants challenged the increase and petitioned the Commission to review the matter. The Ordinance required that rent challenges be heard no later than 45 days after the petition is filed. Mr. Chamberlain asked that the hearing be continued for three months because he was involved in a lengthy civil trial in San Jose. He agreed to postpone collecting the increased rent until the Gallands prevailed in the matter. Clovis set the matter for hearing on June 23, 1989, and ordered the Gallands to submit their documentation supporting the increase by May 19, 1989. Mr. Chamberlain failed to submit the Gallands' material because he was still involved in the trial and

asked for a continuance on May 22. The tenants objected and asked that the matter be dismissed. The Gallands submitted their presentation on June 7. On June 9, 1989, the Commission dismissed the proceedings but failed to prepare a written decision on the matter until January 29, 1992, after the Gallands applied to the superior court for an order requiring Clovis to do so.

On June 29, 1989, the Gallands noticed a $25 a month rent increase effective September 1, 1989, which raised the per space rents to $294 a month. The tenants challenged the increase and the matter was set for hearing on September 29, 1989.

The Gallands supported the rent increase with updated figures noting that no rent increase had been permitted for two and a half years. Based on the CPI, the purchasing power of the current $269 rent (worth $119 in 1978 dollars) was less than the $144 rent charged in 1978. The $294 increased rent was worth only $127.89 in 1978 dollars. The increased rent remained below market levels. In the past six months, four new tenants had rented spaces at the Woods for $315. The Gallands contended they were not receiving a fair ROI. They renewed their argument that ROI calculations must be adjusted for inflation to prevent confiscatory results. The projected ROI for the Woods in 1989 was 9 percent, the same return realized in 1988.

The tenants responded that the low ROI appeared to be due to unusually high operating expenses. The tenants opined that the increase reflected the Gallands' attempt to pass their unsuccessful rent review litigation costs on to the tenants.

The Gallands replied that they did not include legal fees incurred solely to obtain the 1988 rent increase. They had included the legal and expert fees incurred to comply with the city council's order on remand which was geared to educating the Commission and the council as to appropriate guidelines in applying the Ordinance.

At the conclusion of the hearing, the Commission voted to disallow legal and expert fees as operating expenses. The Commission then found, based on its misinterpretation of a document presented in an unrelated rent proceeding which was introduced after the hearings in this proceeding were closed, that 60 percent of the items reflected in the CPI were not relevant to a mobilehome park. Therefore, the rent should be increased by an amount equal to 40 percent of the increase in the index. Under this formula, a $14 increase was justified.

The Commission reviewed the draft findings with the parties at a hearing on November 3, 1989. Clovis's city attorney acknowledged the Commission should not have relied on the ex parte information without notice to the parties. The hearing was continued to give the parties an opportunity to review and respond to that information.

The Gallands pointed out the Commission's mistake in interpreting the CPI table. However, on December 13, 1989, at a continued hearing on the matter, the Commission readopted its earlier findings. The Commission did not issue a final decision until January 29, 1992, after the Gallands sought a court order directing its issuance. The Gallands could not appeal the 1989 Commission decisions to the city council until the final written decisions were

issued. When the final decisions issued, the Gallands appealed to the city council in February 1992.

Under the Ordinance, the Gallands could continue to collect the full $25 increase until an appeal before the city council was final. However, they opted not to collect the disputed $11 portion of the noticed increase as of February 1, 1990.

The appeal was eventually heard by the city council in May 1992. The council upheld the decisions of the Commission finding them reasonable and supported by a preponderance of the evidence.

1990 Rent Proceedings

In January 1990, the Gallands noticed a rent increase of $15 a month for tenants of double-wide mobilehome coaches, and $9 a month for tenants of single-wide coaches, effective April 1, 1990. The tenants petitioned for review of the increases, a hearing on the matter was set for May 18, 1990, and the parties were given a briefing schedule with the materials due at 12 noon on the given dates.

The Gallands submitted their opening presentation on the date it was due but at 2:19 p.m. rather than by noon. They included current financial figures showing an 8.1 percent return for the Woods in 1989, approximately the same return generated by certificates of deposit at local institutions. They again reiterated that standard accounting principles required the investment be adjusted for inflation in calculating rate of return.

The tenants responded that the rent increase should be disallowed and the proceedings dismissed because the Gallands' materials were not timely submitted. On the merits, the tenants challenged various items on the Gallands' cash flow table and concluded since the Woods' rent was the second highest in the area, the Gallands were receiving more that a fair ROI. With their response, the tenants filed a request that the city council issue a subpoena duces tecum requiring the Gallands to produce all financial statements and balance sheets, all accounting work papers and supporting documents, and all support and work papers used to generate the cash flow tables for 1978 through 1989.

The Gallands objected to the subpoena request, noting that the cost of complying would be "staggering" and their accountant had verified the accuracy of the figures in earlier proceedings.

On May 8, 1990, 10 days before the scheduled hearing, the Commission asked the Gallands to provide additional information including: an auditor's statement supporting the Gallands' reported expenses, further breakdown of a number of the income and expense categories, details regarding the Woods purchase, and copies of the Consumer Price Shelter Index for the Pacific Cities and U.S. Cities Average for 1986 through 1989.

The Gallands submitted the requested information along with their opposition to the tenants' request to dismiss the proceedings and request for subpoena. They offered to make the Woods' financial records available for audit by an independent CPA at the tenants' expense.

The Commission met on June 4, 1990, to consider the tenants' requests to dismiss the proceeding because of the Gallands' "late" filing and for a subpoena. After a two-and-a-half-hour hearing, the Commission denied the motion to dismiss and attempted to broker a compromise regarding the subpoena. The city attorney proposed that Clovis hire an independent CPA to review the audit work papers and auditor's statement for the last five years and to answer specific questions raised by the tenants. The Commission agreed to that proposal.

In response, the tenants requested extensive detail regarding the information the Gallands' had prepared in response to the Commission's request for further information on May 8. The Commission requested that Mr. Chamberlain provide a sworn declaration setting forth details regarding almost every aspect of the park's operation since 1978 including: purchase, ownership, and day-to-day operations; daily, monthly and annual business and accounting practices; the same information as to PMS; and auditing practices and procedures for the Woods, for other parks managed by PMS, and for the Gallands with regard to this investment. The Commission also requested additional information (the items cover two and a half, single-spaced, typed pages) regarding utilities, water and sewer payments, interest income, management fees, lease payments and legal and accounting expenses.

The Gallands complied. Mr. Chamberlain provided a detailed 22-page declaration and 18 pages of additional information.

On July 2, 1990, the Commission met to decide whether to request a subpoena or an independent audit. After a two-and-one-half-hour hearing, the Commission decided that neither was necessary. The matter was set for further hearing on August 13, 1990.

On August 2, 1990, the city attorney notified the Gallands that a Commission member had contacted the tenants' representative and provided him with copies of public records relating to the purchase of the Woods. The Commission provided copies of those materials to the Gallands and requested additional information regarding the Woods' purchase, financing and lease payments. Mr. Chamberlain had supplied this information in his June declaration. The Commission asked the Gallands to produce the purchase agreement and lease documents and to provide "a full explanation with details." In addition, because public records indicated that Mr. Galland was an incorporator of PMS in 1978, the Gallands should "fully and clearly" explain his status in this regard. The tenants requested the PMS corporate minutes from the date of incorporation through the present, and a record of all stock sales.

Mr. Chamberlain submitted another declaration and supporting documents which explained the purchase/lease back agreements. In May 1978, the Margaret G. Rose Testamentary Trust agreed to provide the Gallands with $600,000 to purchase the Woods in exchange for title to the land and a 50-year lease back. On June 9, 1978, the Gallands purchased the Woods from a third party for $4,158,625 (land – $500,000, improvements – $3,613,625, personal property – $45,000). The Gallands made a $600,000 down payment and the sellers took two notes.

On August 1, 1978, the Gallands executed a grant deed to the trust as required by the terms of the May agreement.

Margaret G. Rose was Mrs. Galland's mother. She died in 1969 and the trust was created pursuant to her will. Mrs. Galland's father has a life estate in the trust. Income from the trust estate and, if necessary, principal, are used for his benefit. On his death, any remaining assets will be distributed to Mrs. Galland.

Mr. Galland was a 50 percent shareholder in PMS from 1978 until 1985 but had received no compensation or dividends after he resigned as president in 1980. In 1985, Mr. Chamberlain purchased Mr. Galland's shares of stock in PMS.

The Commission, minus the member who had contacted the tenants, heard the matter on August 13, 1990. The Gallands presented evidence supporting the $15 and $9 rent increases. Their current return on their investment in the Woods (adjusted for inflation) was 8.1 percent whereas equally risky investments enjoyed a 25 percent rate of return. The ROI in adjusted dollars pursuant to Dr. Nordstrom's method which the Commission had employed in past years was 16 percent. The increase would bring that return up to 20.44 percent.

Dr. Nordstrom testified for the tenants. He reversed his earlier position that the investment need not be adjusted for inflation and claimed that had been his position all along. He now believed the requested rent increase was not justified because the Gallands had misstated their "investment" in past years. He opined that the purchase/lease-back transaction resulted in a down payment of $0 rather than $600,000. Thus, the Gallands'

investment consisted of principal payments only. By his calculations, the Gallands received a 140.63 percent ROI in 1989. Dr. Nordstrom also believed that management fees, lease payments and extraordinary operating expenses should be deducted to determine cash flow. And, contrary to his opinion in 1988 that a 20 percent return was fair, he now believed a 14 percent return was fair.

At the conclusion of the almost seven-hour hearing, the Commission approved increases of $7.50 and $4.50, half of the increases requested. The Commission found the Woods was jointly owned by the Gallands and the Rose Trust. Therefore, the lease payments were return on investment rather than expenses. In addition, the Commission disallowed attorney and expert fees incurred in the rent review proceedings. With these adjustments, the Gallands' return on the inflation adjusted investment was 11.8 percent. However, contrary to the opinion of both experts, the Commission concluded based on "common sense" that the ROI calculation should be based on historic investment. Using the unadjusted figures, the approved rent increases yielded a 23.5 percent ROI, which the Commission deemed fair.

The proposed findings and decision were issued on September 21, 1990. The final decision was not issued until January 29, 1992, pursuant to court order. Both parties appealed. The city council heard the appeals in May 1992 with the Gallands' appeal of the Commission's decisions on the 1989 rent increases. The city council upheld the decisions of the Commission.

JUDICIAL PROCEEDINGS

In May 1990, the Gallands sued Clovis for damages for inverse condemnation, denial of substantive and procedural due process under the state and federal Constitutions, and for violations of civil rights protected by 42 United States Code section 1983. They contended that Clovis's application of the Ordinance constituted a regulatory taking because it decreased the value of the property. Clovis's actions also denied them a fair return on their investment. They filed concomitant petitions for writ of administrative mandate challenging the process employed and the denial or modification of the 1988 and 1989 rent increases. The matters were consolidated for trial. The Gallands filed a first amended complaint in January 1993 adding allegations stemming from the 1990 rent review proceedings.

The Gallands alleged that Clovis denied them *procedural due process* by failing to provide adequate notice as to what they must prove to establish a rent increase is not an "unreasonable increase" under the Ordinance. Despite the Gallands' request for some standards, Clovis issued no written guidelines and the Commission's decisions were so inconsistent that they provided no de facto notice as to the owner's burden. In addition, Clovis's application of the rent review scheme denied the Gallands a fair hearing. The Commission relied on ex parte information without notice to the Gallands, it imposed costly and onerous information demands only to ignore the information when it was produced, it disallowed the Gallands' costs of complying with those requests as increased operating expenses to support a rent increase, it ignored uncontroverted expert evidence, and it made arbitrary

and inconsistent findings to justify its decisions. Further, Clovis failed to issue final Commission decisions and to prepare the administrative record, thus preventing the Gallands from obtaining judicial review of the administrative proceedings and decisions.

The Gallands alleged that the same acts also denied them *substantive due process*. Clovis's actions in implementing rent control were arbitrary and unfair and placed an impermissibly onerous and costly burden on the park owner. As a result, the Gallands were denied a fair return on their property. Clovis's actions, which were taken in accordance with the custom of the municipality, deprived the Gallands of the right to due process in violation of section 1983.

The Gallands also challenged the Commission decisions pursuant to section 1094.5 on a number of grounds alleging essentially the same procedural and substantive due process violations as set forth in their complaint.

Clovis answered the complaint, essentially denying the allegations of wrongdoing. It did not assert any affirmative defenses. The case was set for trial on August 19, 1991.

In May 1991, the Gallands filed a motion to compel and for sanctions for Clovis's failure to respond to discovery requests. The Gallands took the matter off calendar in reliance on Clovis's promise to provide responses. In late June, the Gallands filed a motion to compel further responses. The parties eventually agreed that Clovis would provide further answers by July 17, 1991. About

that time, the court consolidated the complaint for damages with the writs of mandate and assigned the matter to Judge Kerkorian for trial.

In August 1991, Judge Kerkorian set the matter for trial on June 29, 1992, and ordered Clovis to prepare final written decisions of all proceedings to be served on the parties by October 1, 1991, and to prepare the administrative record by November 1, 1991. Clovis failed to prepare the final decisions causing the Gallands to seek relief from the trial court. At the hearing on that motion, the parties stipulated to a second briefing schedule and trial was reset a second time for July 14, 1992. The amended order gave Clovis until January 1, 1992, to complete the administrative proceedings. By mid-January 1992, Clovis had not prepared the final Commission decisions and the Gallands returned to court to force Clovis to comply with the court orders. At the hearing on the motion, the parties stipulated to a third briefing schedule and trial was reset for October 15, 1992. Clovis served the final Commission decisions on January 29. The parties agreed the appeal to the city council would be heard on March 9, 1992, and the council's final decision would be prepared by March 17, 1992.

Clovis continued the hearing before the city council until mid-May, after the city council elections. Clovis had still not prepared the administrative record. At a status conference on May 11, 1992, the parties stipulated to a fourth pretrial briefing schedule and order. The order required the appeal to be heard on May 19 and a final decision to be issued by June 1, 1992. Trial was reset a fourth time for December 1, 1992.

In October 1992, Clovis substituted its current counsel for its former counsel, necessitating another trial continuance.

Meanwhile, the Gallands had noticed rent increases in 1991 and 1992, which the tenants challenged. The Gallands protested that further rent review proceedings should be postponed until Clovis completed the 1989 and 1990 proceedings. Clovis initially agreed but, in November 1992, it notified the Gallands it intended to proceed with the rent challenges. The Gallands petitioned the court for a peremptory writ of prohibition staying further administrative proceedings pending judgment on the pending writs of mandate. Clovis opposed the stay. In February 1993, the trial court granted the Gallands' petition and stayed the 1991 and 1992 rent increase proceedings. The court found the Commission could not meaningfully review the rent increases when prior increases remained unsettled.

Pursuant to a fifth amended briefing schedule, the parties filed extensive briefs in May and June 1993. The administrative record was lodged with the court on June 3, 1993. At a status conference on June 22, 1993, the parties agreed the court would determine liability from the administrative record, the parties' briefs and the court's file in the matter. If the court determined the Gallands had prevailed on the petitions for writ of mandate and/or the complaint, the court would hold further proceedings to determine remedies and damages.

TRIAL COURT DECISION

In August 1994, the court issued a statement of decision. It found that the manner in which the Commission and council applied and administered the Ordinance during the 1988, 1989 and 1990 rent review proceedings violated the Gallands' procedural and substantive due process rights. However, the violations did not effect a taking under the Fifth Amendment to support an inverse condemnation claim.

Based on the due process violations, the court granted the petitions for writ of administrative mandate, vacated the Commission decisions and dismissed the administrative proceedings. The expense and delay caused by the due process violations rendered the rehearing remedy provided by section 1094.5 "patently inadequate." The court concluded the Gallands were entitled to damages under section 1983 for their loss of a fair ROI and for the expenses, costs and reasonable attorney fees incurred as a result of Clovis's arbitrary and unreasonable actions.

After hearings on the issue, the court awarded the Gallands damages pursuant to section 1983 as follows: (1) $247,885 for costs incurred as a result of the arbitrary and unreasonable administrative proceedings ($254,860 [amount actually spent] minus $6,975 [amount the Gallands would have spent absent the constitutional violations]); (2) $236,806 for lost rents from 1988 through March 31, 1995, based on the methodology stipulated to by the parties for calculating fair ROI; (3) prejudgment interest on items (1) and (2); (4) attorney fees of $378,955;

(5) costs of suit pursuant to section 1033.5; and (6) post-judgment interest from October 10, 1995.

DISCUSSION

1. This appeal is limited to legal issues.*

While Clovis provided a chronology of the administrative proceedings, it did not provide any facts regarding the substance of the proceedings which underlie the Gallands' due process claims and the trial court's findings. Clovis states it does not dispute the trial court's factual findings; it challenges the legal findings based on those facts. For the most part, Clovis raises legal issues on appeal. However, to the extent it contends a finding is not supported by the evidence or does not reflect the "full picture," those contentions are waived. (*MST Farms* v. *C. G. 1464* (1988) 204 Cal.App.3d 304, 306.)

Clovis's concessions regarding the factual findings of the trial court simplify the issues before this court. The trial court found that the administrative proceedings were so burdensome, unreasonable, unduly delayed and in some respects unrelated to legitimate purposes of rent control that they deprived the Gallands of substantive due process. As a result, the Gallands were entitled to damages for the loss of fair ROI caused by the unlawful proceedings. The court's conclusion reflects an implied finding that the Commission's irrational application of the ordinance denied the Gallands a fair return on their

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* See footnote, *ante*, page 1.

property, a crucial finding which supports the Gallands' substantive due process claim.

2. Clovis's conduct in administering the Ordinance constituted substantive, as well as procedural, due process violations.*

The trial court found that Clovis violated the Gallands' procedural and substantive due process rights by: (1) knowingly making the rent review process so time-consuming, expensive and burdensome that the potential benefits of participating (enabling the owner to implement a rent increase to obtain a fair return) were nonexistent and illusory; (2) delaying preparation of final decisions and thereby precluding the Gallands from obtaining judicial review of the rent decisions; (3) relying on ex parte evidence; (4) making arbitrary and unreasonable requests for information having no substantial relation to the legitimate purposes of rent control or the public welfare; (5) failing to provide guidelines as to the proof needed to establish "investment" and "fair ROI" under the Ordinance; (5) disallowing the costs of participating in the onerous process in calculating fair return at least as to expenses incurred in seeking the apparently reasonable increases at issue; and (6) (by implication) depriving the Gallands of a fair return by virtue of the unduly burdensome administrative proceedings.

Clovis contends the substantive due process violation finding is erroneous for two reasons: (1) the administrative irregularities violated the Gallands' procedural

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* See footnote, *ante*, page 1.

rather than substantive due process rights and (2) the court applied the wrong standard in determining that the actions constituted substantive due process violations. Neither contention has merit.

Due Process Implications of Rent Control[1]

The due process clauses of the state and federal Constitutions guarantee property owners "due process of law" when the state deprives them of property. (Cal. Const., art. I, §§ 7, 15; U.S. Const., 14th Amend., § 1.) Due process protection is twofold. First, it guarantees the procedural safeguards of notice and an opportunity to be heard before a person is deprived of property. Second, it places substantive limitations on all branches of government to prevent action that is "arbitrary or discriminatory" or that lacks "a reasonable relation to a proper legislative purpose." (*Kavanau, supra,* (1997) 16 Cal.4th at pp. 770-771; 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 481, pp. 668-669; 1 Nahmod, Civil Rights and Civil Liberties Litigation (4th ed. 1997) § 3:70, pp. 3-195 to 3-198 (Civil Rights Litigation).) Substantive due process recognizes that some governmental deprivations of life, liberty or property are subject to limitations regardless of the fairness of the procedures used to implement them. (*Zinermon* v. *Burch* (1990) 494 U.S. 113, 125.) An economic regulation like rent control does not

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[1] For an overview of rent control see 4 Witkin, Summary of California Law (9th ed. 1987) Real Property, section 558 et seq.; 6 Miller and Starr, Current Law of California Real Estate (2d ed. 1989) section 18:67 et seq.; and California Landlord-Tenant Practice (Cont.Ed.Bar 1998) section 7.1 et seq.

violate substantive due process as long as it is reasonably related to the accomplishment of a legitimate governmental interest. (*Kavanau, supra,* at p. 771.)

In the 1970's, an increasing demand for mobilehomes and a limited supply of mobilehome park spaces put park owners in a position to charge high rents for the few spaces available. As a result, a number of California communities enacted mobilehome rent review ordinances which limited the owners' right to rent their property for the market rate. (Cal. Landlord-Tenant Practice, *supra,* § 7.11, p. 453.) Courts generally rejected facial challenges to the ordinances and upheld them as valid exercises of police power and consistent with due process as long as they were reasonably calculated to eliminate excessive rents and provided a system which permitted the owners to obtain a fair return on their regulated property. (See, e.g., *Santa Monica Pines, Ltd.* v. *Rent Control Board* (1984) 35 Cal.3d 858, 868; *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, 165, 173 (*Birkenfeld*); *Yee* v. *City of Escondido* (1990) 224 Cal.App.3d 1349, 1353; 6 Miller & Starr, Current Law of Cal. Real Estate, *supra,* § 18:67 et seq.)

The constitutional "fair return" mandate recognizes that local governments may not force an individual property owner to bear public burdens, such as affordable housing for low or fixed income tenants, which in all fairness should be borne by the public as a whole. (*Kavanau, supra,* 16 Cal.4th at pp. 773-774.) Requiring a "fair return" on the value of the property used for a public purpose also satisfies the "just compensation" safeguarded to the regulated landlord by the Fifth and Fourteenth Amendments. (*Calfarm Ins. Co.* v. *Deukmejian* (1989) 48 Cal.3d 805, 819.)

The California Supreme Court recently addressed the substantive due process implications of rent control. (*Kavanau, supra,* 16 Cal.4th 761.) The court stated that a rent control ordinance bears a reasonable relation to a proper legislative purpose as long as it does not deprive the landlord of a fair and reasonable return and thereby become "confiscatory." (*Id.* at p. 771.) Justice Mosk adds that "due process" has two distinct meanings in the field of rent regulation: (1) substantive due process, i.e., whether the scheme of regulation is arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and (2) "confiscatory" due process, i.e., whether a given scheme of rate regulation, although not facially invalid, is confiscatory in its result and has prevented an opportunity to obtain a just and reasonable rate of return on investment. (*Kavanau, supra,* 16 Cal.4th at p. 786 (conc. opn. of Mosk, J.).)

When considering whether application of a rent regulation violates due process, a court balances the interests of the owner and the tenant. The court determines whether the scheme may reasonably be expected to maintain the owner's financial integrity, attract necessary capital and fairly compensate the owner for the risks he or she has assumed, while at the same time providing appropriate protection for the relevant public interests. (*Kavanau, supra,* 16 Cal.4th at pp. 771-772.) Due process does not mandate a particular administrative formula for measuring fair return, but requires a procedural mechanism that is not prohibitively burdensome by which landlords may obtain rent adjustments. Due process also requires that the proceedings not entail substantially greater delay than is practically necessary. (*Id.* at p. 772.)

Clovis contends the Gallands alleged and proved procedural due process violations only, so the court erred in finding substantive due process violations. It is mistaken. The Gallands alleged the rent review board proceedings were unfair and arbitrary and deprived them of a fair return. The trial court found, in effect, that Clovis's arbitrary and irrational application of the Ordinance lacked any reasonable relation to a proper legislative purpose. The rent review process was so burdensome and expensive that it substantially increased the Gallands' operating expenses which could only serve to increase rents and decrease the owners' return. In addition, the unreasonable application deprived the Gallands of a fair return on their property. These findings support the court's conclusion that Clovis's conduct violated the Gallands' substantive due process rights. (*Kavanau, supra,* 16 Cal.4th at p. 771; *Birkenfeld, supra,* 17 Cal.3d at pp. 169-171.)

(a) The standard for a substantive due process violation in the context of rent control is "arbitrary and irrational conduct."

The trial court concluded that Clovis's conduct constituted a substantive due process violation within the meaning of section 1983 under the rule of *Sierra Lake Reserve v. City of Rocklin* (9th Cir. 1991) 938 F.2d 951, 956-957 (*Sierra Lake Reserve*) vacated in part (1993) 987 F.2d 662. In *Sierra Lake Reserve,* the owner of a mobilehome park made physical improvements and applied for a rent increase as permitted under the rent control ordinance. The city manager rejected the application and advised the owner to refile under a new rent

ordinance soon to be enacted. The new ordinance did not allow the owner to recover all the costs of improvements. When the owner refiled the rent increase application under the new ordinance, the city manager rejected it because the owner had not indicated the place of execution although the application contained no space for indicating place of execution. The owner refiled the application. The city eventually processed it but granted an inadequate increase. (*Id.* at pp. 953-954, 956.) Sierra Lake sued alleging due process violations and other claims.

The Ninth Circuit held that the allegations stated a cause of action for a violation of substantive due process as well as procedural due process. (*Sierra Lake Reserve, supra,* 938 F.2d at pp. 957-958.) While a substantive due process claim may arise out of the same facts as a procedural due process claim, the claims are different. A procedural due process claim challenges the procedures used in effecting a deprivation. A substantive due process claim challenges the governmental action itself. (*Id.* at p. 957.) To establish a violation of substantive due process Sierra Lake had to prove that the government's action was " 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' " (*Ibid.*, citing *Sinaloa Lake Owners Ass'n v. City of Simi Valley* (9th Cir. 1989) 882 F.2d 1398, 1407, quoting *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 395.) In other words, that no rational relationship exists between the governmental action and the purpose of the ordinance. (*Sierra Lake Reserve, supra,* at p. 958.)

Clovis contends the court erred in finding a substantive due process violation based on the *Sierra Lake Reserve* standard because (1) that standard is not applied in California and in other federal circuit courts, (2) subsequent Ninth Circuit cases employ a different standard, (3) emerging policy considerations bode in favor of limiting substantive due process claims, and (4) the standard applies to legislative not adjudicative decisions. None of the contentions have merit.

California Law

Clovis relies on two building permit/zoning cases for its contention that California law imposed a higher standard to find a substantive due process violation. The cases are factually and legally distinguishable. In *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 (*Clark*), the city council voted three to two to deny property owners a building permit on the ground the proposed building was excessive in size although it was within the city's height restriction. The proceedings were riddled with error. The owners sued the city seeking a writ of administrative mandate and alleging a violation of federal civil rights (section 1983). The court agreed the owners were deprived of a fair hearing and were entitled to relief under section 1094.5, but found the city's conduct did not violate the owners' due process rights under section 1983. (*Id.* at pp. 1172-1174.)

The court questioned whether substantive due process applied to local land-use decisions. Assuming that it did, the owners lacked a protectable property interest in the discretionary permit they sought. Moreover, even if

they had a constitutionally recognized property interest, the city's conduct did not constitute substantive due process violations. (*Clark, supra,* 48 Cal.App.4th at pp. 1183-1184.) Substantive due process did not protect individuals from all governmental actions that violate administrative procedures and injure property. Rather, substantive due process prevented oppressive governmental power, or abuse of government power that "shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." (*Id.* at pp. 1184-1185, citing *PFZ Properties, Inc. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28, 31-32.) To satisfy the "shock the conscience" standard, the plaintiffs had to show more than that the government intentionally injured them by abusing or misusing government power. They had to demonstrate a degree of outrageousness and a magnitude of potential or actual harm that was truly conscience shocking. (*Clark, supra,* at p. 1185, citing *Uhlrig v. Harder* (10th Cir. 1995) 64 F.3d 567, 573-574.) The procedural irregularities at issue did not shock the conscience. (*Clark, supra,* at p. 1186.)

Clovis's second cited case is similar. In *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, Stubblefield, a developer with 600 acres of land, planned to build multifamily housing. He agreed to allow annexation to the city in exchange for a promise that the necessary R-3 zoning would follow. It did. However, a city councilman representing the area, who originally had supported the project, subsequently became a vocal opponent. (*Id.* at p. 697.) The city revised its R-3 zoning ordinance, portions of which adversely affected

Stubblefield's project, but he was assured the new ordinance would not apply to his project. (*Ibid.*) The councilman proposed an urgency ordinance which emasculated that assurance. A series of subsequent council actions essentially killed the project. (*Id.* at pp. 696-700.) A jury found the city's actions were not taken for a purpose substantially related to the public health, safety, morals or general welfare and awarded Stubblefield damages in excess of $11.5 million. (*Id.* at pp. 694-695.) The appellate court reversed.

Citing *PFZ Properties, Inc. v. Rodriguez, supra,* 928 F.2d 28, the court held the evidence was insufficient as a matter of law to establish a substantive due process violation. The city had revised a zoning ordinance, changed its development approval policy, required the developer to file a focused environmental impact report for the project, implemented a court-ordered moratorium on development in the area where the project was to be built, denied a request to grandfather the project and revised its general plan. These were actions that responded to concerns of constituents in the affected area and other political concerns. The actions taken were general in nature and had a rational basis. This was an ordinary dispute between a developer and a municipality, and the claims asserted did not qualify as deprivations of substantive due process. (*Stubblefield Construction Co. v. City of San Bernardino, supra,* 32 Cal.App.4th at pp. 709-712; accord, *Tyson v. City of Sunnyvale* (N.D.Cal. 1996) 920 F.Supp. 1054, 1062-1064 [a "run of the mill" dispute between a developer and a planning agency]; but see *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 561 [cumulative

effect of council's actions violated developer's substantive and procedural due process rights].)

While the cited cases may stand for the proposition that administrative irregularities that do not amount to constitutionally irrational conduct in run of the mill land use proceedings do not constitute substantive due process violations unless the irregularities "shock the conscience," they are not dispositive of this case. First, this case involves economic rather than land use regulation. Frequently, in land use cases, the "deprived" applicants had no protectable property interest in the discretionary ruling they requested. They simply had the right to fair administrative hearings. (*Clark, supra,* 48 Cal.App.4th at p. 1178; *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 182-183.) Conversely, rent control implicates a property owner's right to compensation for the use of his land, "a significant stick in the bundle of sticks that together constitute the ownership of real property." (*Kavanau, supra,* 16 Cal.4th at p. 793 (dis. opn. of Baxter, J.).)

Second, California law recognizes that a rent control scheme violates substantive due process if it is not rationally related to a proper legislative purpose or is confiscatory, i.e., does not allow the owner a fair return. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 967; *Kavanau, supra,* 16 Cal.4th at p. 771; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 292.) *Clark* stated that substantive due process prevents oppressive governmental power, or abuse of government power that "shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." (*Clark, supra,* 48 Cal.App.4th at pp.

1184-1185.) In the context of rent control, the "shocks the conscience" standard may simply be an alternate expression of the not rationally related to a proper legislative purpose standard, which the court applied in this case. Moreover, the shocks the conscience standard is irrelevant to the fair return/confiscatory substantive due process analysis that the Supreme Court applies in rent control cases. (*Santa Monica Beach, Ltd. v. Superior Court, supra,* at p. 967; *Kavanau, supra,* at p. 771.)

OTHER FEDERAL CIRCUIT DECISIONS[2]

Clovis cites decisions from the First, Sixth, Eighth and Tenth Circuits which apply a "shocks the conscience" standard to land use decisions in determining whether the plaintiff suffered a substantive due process violation. *PFZ Properties, Inc. v. Rodriguez, supra,* 928 F.2d 28, the case relied on by the *Clark* and *Stubblefield* courts, is typical. PFZ, a developer, brought a section 1983 action against a Puerto Rico agency for refusing to process its building plans. In rejecting PFZ's substantive due process claim, the First Circuit Court of Appeals stated that substantive due process prevents " 'governmental power from being used for purposes of oppression,' " or " 'abuse of government power that shocks the conscience,' " or " 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.' "

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[2] For a summary of circuit court decisions dealing with procedural and substantive due process challenges to land use decisions see Civil Rights Litigation, *supra,* section 3:70, pages 3-195 to 3-199.

(928 F.2d at pp. 31-32.) Allegations that government officials failed to comply with agency regulations and that the agency engaged in delaying tactics and refused to issue permits based on considerations outside the scope of its jurisdiction were not sufficient to support a substantive due process claim. (*Id.* at p. 32; accord, *Licari v. Ferruzzi* (1st Cir. 1994) 22 F.3d 344, 349-350; *Nestor Colon Medina & Sucesores, Inc. v. Custodio* (1st Cir. 1992) 964 F.2d 32, 45; *Pearson v. City of Grand Blanc* (6th Cir. 1992) 961 F.2d 1211, 1222; *Chesterfield Development Corporation v. City of Chesterfield* (8th Cir. 1992) 963 F.2d 1102, 1105; *Crooked Lake Development, Inc. v. Emmet County* (W.D. Mich. 1991) 763 F.Supp. 1398, 1403.)

The cited cases that do not involve land use decisions are likewise inapposite. *Uhlrig v. Harder, supra,* 64 F.3d 567 addressed the showing necessary to establish section 1983 liability when the government creates a danger of violence by a third party. In such cases, the plaintiff must show more than that the state created the danger that harmed him; he must demonstrate the defendant acted in a conscience shocking manner. (*Uhlrig v. Harder, supra,* at pp. 573-574; accord, *Weimer v. Amen* (8th Cir. 1989) 870 F.2d 1400, 1405 [depositors' action against former director of department of banking for allegedly inducing depositors to deposit money in insolvent bank did not establish a substantive due process violation. Something more than a violation of state law must be alleged; the conduct involved must shock the conscience or otherwise offend judicial notions of fairness].)

The federal cases on which Clovis relies are distinguishable from this case for the same reasons that the

Clark and *Stubblefield* cases are. Their "shocks the conscience" standard is either analogous to the arbitrary and unrelated to a legitimate governmental purpose standard or is irrelevant to the fair return/confiscatory substantive due process standard the California courts apply in rent control cases.

Subsequent Ninth Circuit Decisions

Clovis next submits that *Sierra Lake Reserve, supra,* 938 F.2d 951 does not set forth the standard generally employed by the Ninth Circuit to determine substantive due process violations. Moreover, to the extent *Sierra Lake Reserve* relies on *Sinaloa Lake Owners Ass'n v. City of Simi Valley, supra,* 882 F.2d 1398, 1407, *Sinaloa Lake* has been overruled in substantial part. Neither argument undermines the judgment of the trial court.

When reviewing substantive due process challenges to economic legislation, the Ninth Circuit, like the California Supreme Court, upholds the legislation if its provisions bear a rational relationship to a legitimate object of police power. (See, e.g., *Kawaoka v. City of Arroyo Grande* (9th Cir. 1994) 17 F.3d 1227, 1234; *Halverson v. Skagit County* (9th Cir. 1994) 42 F.3d 1257, 1262; *Levald, Inc. v. City of Palm Desert* (9th Cir. 1993) 998 F.2d 680, 690.) However, the Ninth Circuit does " 'not require that the government's action actually advance its stated purposes, but merely look[s] to see whether the government could have had a legitimate reason for acting as it did.' " (*Halverson v. Skagit County, supra,* p. 1262 [county's maintenance of a diking system which protected certain locales

to plaintiffs' detriment was rational exercise of governmental authority].) Plaintiffs must demonstrate there "could have [been] no legitimate reason for [the governmental] decision." If it is "at least fairly debatable" that the conduct is rationally related to a legitimate governmental interest, there is no substantive due process violation. (*Ibid.*)

Assuming these cases use a different standard than *Sierra Lake Reserve* used, application of their standard to the facts of this case would not have changed the result. The trial court's findings support the conclusion that Clovis could have had no legitimate reason for applying the ordinance in the irrational manner it did. Thus, Clovis has not demonstrated error in this regard.

As to the contention that *Sinaloa Lake Owners Ass'n v. City of Simi Valley, supra,* as cited in *Sierra Lake Reserve,* has been overruled in substantial part, it has. But the changed law does not compel a different result for the Gallands. In *Sinaloa Lake,* government officials breached a dam and substantially destroyed the plaintiffs' lake. The plaintiffs sued under federal law seeking compensation for a "taking" and damages for violations of substantive and procedural due process rights. Their allegations painted a picture of government officials bent on destroying the dam for no legitimate reason and determined to conceal that decision to prevent the plaintiffs from taking advantage of available legal processes. The court held the takings claim was not ripe because the plaintiffs had not exhausted their state law remedies, but the plaintiffs had stated a section 1983 claim for violation of substantive due process based on essentially the same facts as the takings claim. (882 F.2d at pp. 1402, 1410.)

Subsequently, the United States Supreme Court refined the role of substantive due process in section 1983 claims. The court held that where a particular amendment provides an explicit source of constitutional protection against a particular sort of government behavior, that amendment, and not the more generalized notion of substantive due process, must be the guide for analyzing the claim. (*Graham v. Connor* (1989) 490 U.S. 386, 395.) Thus, a citizen's claim that law enforcement officials used excessive force during an arrest or detention must be analyzed under the Fourth Amendment's objective reasonableness standard, rather than under a substantive due process standard. (*Ibid;* accord, *Albright v. Oliver* (1994) 510 U.S. 266, 273-274 [the Fourth Amendment and not substantive due process was the appropriate constitutional provision for addressing a section 1983 malicious prosecution claim].)

In *Armendariz v. Penman* (9th Cir. 1996) 75 F.3d 1311, the court considered whether a claim that the state took property for a private use could be alleged as a violation of substantive due process under the rule of *Sierra Lake Reserve* or whether it had to be alleged as a violation of the Fifth Amendment's takings clause[3] under the *Graham* and *Albright* decisions. The court concluded that the Fifth Amendment and not the more generalized notion of substantive due process had to guide the court's review of

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[3] The "takings clause," made applicable to the states through the Fourteenth Amendment, states that "private property [shall not] be taken for public use, without just compensation." The amendment also provides that "[n]o person shall be . . . deprived of . . . property, without due process of law."

the plaintiffs' claim. (*Armendariz v. Penman, supra,* at pp. 1323-1324.) In so holding, the court overruled *Sinaloa Owners Ass'n v. City of Simi Valley* to the extent it stood for the proposition that a plaintiff may bring a substantive due process claim in lieu of a more explicit, though unripe, constitutional claim. (*Armendariz v. Penman, supra,* at p. 1326.)

In arguing that *Sinaloa Owners Ass'n v. City of Simi Valley* is no longer good law, Clovis does not contend that the Gallands' substantive due process claim should have been analyzed as a "takings" claim.[4] Rather, Clovis contends that is another reason why the court should have applied the "shocks the conscience" standard to determine whether there was a substantive due process violation. However, for all the reasons set forth above, the trial court did not err in concluding that Clovis's application of the rent control scheme violated substantive due process because the application was not rationally related to a proper rent control purpose and denied the Gallands a fair return. (*Kavanau, supra,* 16 Cal.4th at p. 771.)

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[4] The due process clause and the takings clause provide two separate constitutional protections applicable to rent control, but their application is imprecise. Due process places substantive limitations to prevent governmental action that is arbitrary, discriminatory or unrelated to a proper legislative purpose. It requires a fair return to the landlord. Under the takings clause, an owner must be compensated for the appropriation of private property for a public use. When a regulation "goes too far," there may be a taking and the owner must be compensated for the taking. (*Kavanau, supra,* 16 Cal.4th at pp. 771-777; and see *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (May 24, 1999) ___ U.S. ___ [99 Daily Journal D.A.R. 4908, 4913].)

EMERGING POLICY CONSIDERATIONS

Interspersed throughout its contentions, Clovis cites case law for the proposition that courts have begun to restrict the reach of substantive due process to certain core values. (See, e.g., *Clark, supra,* 48 Cal.App.4th at pp. 1183-1184.) Clovis relies on *Rivkin v. Dover Tp. Rent Leveling Bd.* (1996) 143 N.J. 352 [671 A.2d 567] (*Rivkin*), a mobilehome park rent review case from the New Jersey Supreme Court, as a persuasive illustration. The Rivkins filed an application for a rent increase with the local mobilehome rent leveling board after making about $60,000 of capital improvements to their park. The board conducted four hearings between June and October 1990. The tenant member of the board, who was a tenant of the Rivkins' park, apparently viewed his position on the board as one of advocacy rather than adjudication. He continually challenged the Rivkins and introduced facts outside the record. The board refused the Rivkins' request to remove the biased board member and granted $20,641 in rent increases, finding that the majority of the Rivkins' expenditures were "capital expenditures," a nonrecoverable item, rather than "major capital improvements," which were recoverable under the ordinance. The Rivkins appealed the decision and sought damages under section 1983 for a violation of their due process rights. The reviewing court reversed the rent board's decision and remanded the matter for a new hearing without the biased board member. On remand, the board approved an additional $25,089. The reviewing court then awarded counsel fees and $6,303 in compensatory damages under section 1983. (*Rivkin, supra,* 143 N.J. at pp. 358-360 [671 A.2d at pp. 571-572].)

The New Jersey Supreme Court reversed the section 1983 damages award. The court noted the United States Supreme Court trend to limit substantive due process rights under the Fourteenth Amendment and concluded that the denial of a property right in the context of municipal governance will rarely rise to the level of a substantive due process violation. (*Rivkin, supra,* 143 N.J. at p. 366 [671 A.2d at p. 574].) A party aggrieved by the actions of a municipal rent leveling board does not suffer a substantive due process violation unless the actions of the board constitute egregious misconduct that shocks the conscience in the sense of violating civilized norms of governance or invidious discrimination. (*Id.* at p. 358 [p. 570].)

The *Rivkin* analysis does not apply in this case. First, although the Rivkins asserted they had been denied their right to substantive due process or, alternatively, they had been deprived of property without procedural due process, the facts established a procedural due process violation only. The Rivkins were deprived of property as a result of an unfair hearing. There was no indication that the board's application of the rent ordinance was irrational or that it deprived the Rivkins of a fair return, the necessary prerequisites for a substantive due process claim. (*Kavanau, supra,* 16 Cal.4th at p. 771.) Second, because, in fact, the court was considering only procedural due process violations, it did not attempt to reconcile the governmental action which "shocks the conscience" standard with the well-established standard for determining whether a rent control scheme violates substantive due process: " ' "if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is

free to adopt." ' " (*Pennell v. City of San Jose* (1988) 485 U.S. 1, 11; *City of Monterey v. Del Monte Dunes at Monterey, Ltd., supra,* ___ U.S. ___ [99 Daily Journal D.A.R. at p. 4913].) Thus, *Rivkin* does not support Clovis's claim that emerging policy considerations required the trial court to apply the shocks the conscience standard to determine whether Clovis's actions constituted a substantive due process violation.

LEGISLATIVE VS. ADJUDICATIVE DECISIONS

Finally, Clovis contends that the "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare" standard, which it abbreviates to the "arbitrary and unreasonable" standard, applies to legislative decisions, not to decisions resulting from quasi-judicial proceedings as in this case. Clovis asserts, the notion of substantive due process is normally associated with attacks on legislative exercises of police power, i.e., the adoption of legislation. At least one California court has questioned whether a substantive due process attack can be made on adjudicatory exercises of authority under a legislative enactment. (*Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148, 168-169.) And, most of the cases involving substantive due process rent control challenges are attacks on the facial validity of the ordinance itself. (E.g., *Pennell v. City of San Jose, supra,* 485 U.S. 1; *Birkenfeld, supra,* 17 Cal.3d 129; but see *Sierra Lake Reserve, supra,* 938 F.2d at p. 958.)

Clovis's contention fails. In the context of rent control, substantive due process prohibits the government

from enacting legislation that is arbitrary and unreasonable in that it deprives the landlord of a fair return, i.e., is confiscatory. (*Kavanau, supra,* 16 Cal.4th at p. 771.) Thus, rent control laws must possess structural features that safeguard against confiscatory results. Among those features is a procedural mechanism that permits rent increases without imposing a prohibitive burden or entailing substantial delay. (*Santa Monica Beach, Ltd. v. Superior Court, supra,* 19 Cal.4th at p. 963; *Kavanau, supra,* 16 Cal.4th at p. 772.) However, these due process limitations are not limited to the legislation itself. "[B]oth the enactment and administration of rent control laws are subject to . . . constitutional constraints." (*Santa Monica Beach, Ltd. v. Superior Court, supra,* at p. 962.) Decisions of public agencies charged with administering rent control may be challenged on substantive due process grounds and deemed to be unconstitutional if as a result landlords are deprived of a fair rate of return. (*Id.* at pp. 962-963, citing *Kavanau, supra,* 16 Cal.4th at p. 778; and see *Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 Cal.App.4th 730, 736 [rent control ordinance as applied was confiscatory]; *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd.* (1994) 30 Cal.App.4th 84, 95 [whether owner is deprived of a fair return depends not on the facial validity of the ordinance but on whether the board's application of the ordinance permits the owner a fair return].) Thus, the trial court properly applied the "arbitrary and unreasonable" standard to determine whether Clovis's application of the ordinance violated the Gallands' substantive due process rights.

In summary, the record supports factual and legal findings that Clovis's application of the ordinance

resulted in a rent review process that was so burdensome and expensive that it substantially increased the Gallands' operating expenses which could only serve to increase tenant rents and decrease the owners' return. The process bore no reasonable relation to a proper legislative purpose – eliminating excessive rents – and deprived the Gallands of a fair return on their property. From these findings the court properly concluded under California law that Clovis's actions constituted substantive as well as procedural due process violations.[5]

3. Section 1094.5 did not require the trial court to remand the matter for fair hearings, or preclude it from dismissing the administrative proceedings and awarding damages under section 1983.*

By petitions for writ of mandate pursuant to section 1094.5, the Gallands challenged the rent review decisions

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[5] Our conclusion that Clovis's application of the Ordinance as found by the trial court violated substantive as well as procedural due process moots Clovis's argument that the Gallands' claims under section 1983 are precluded by the doctrine formulated in *Parratt v. Taylor* (1981) 451 U.S. 527 and *Hudson v. Palmer* (1984) 468 U.S. 517. In those cases the Supreme Court held the existence of a state procedure that satisfies the requirements of *procedural* due process precludes a section 1983 action. Clovis does not contend that a finding of both procedural and substantive due process violations requires bifurcated remedy proceedings under the *Parratt/Hudson* doctrine. Because the doctrine does not apply to substantive due process violations, the availability of alternative relief under section 1094.5 does not preclude an award of damages under section 1983. (*Zinermon v. Burch, supra,* 494 U.S. at p. 125; *Handschuh v. Superior Court* (1985) 166 Cal.App.3d 41, 45.)

*See footnote, *ante,* page 1.

on the grounds Clovis denied them a fair hearing, it did not proceed according to law, its findings were not supported by the evidence and its decisions were not supported by the findings. The trial court granted the petitions based on finding that Clovis had violated the Gallands' substantive and procedural due process rights throughout the rent review proceedings. However, the court concluded that section 1094.5 would not provide an adequate remedy in the case, vacated the Commission decisions, and dismissed the administrative proceedings. Instead of section 1094.5 relief, the court ordered that the Gallands were entitled to section 1983 damages for their loss of fair return caused by Clovis's arbitrary and unreasonable actions and for the expenses and costs incurred as a result of those actions.

Clovis submits that section 1094.5, subdivision (b)[6] obligated the trial court to review the administrative record to determine (1) whether substantial evidence supported the Commission decisions on the rent increases and (2) whether the Gallands received fair hearings. On finding deficiencies in either regard, the court had to remand the matter to the administrative agency for

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[6] The subdivision provides: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

rehearings on the rent increases. The trial court was without authority to determine the merits of the rent increases de novo. Clovis's arguments are flawed.

First, the court was not required to conduct a substantial evidence review. Once the court determined the Gallands did not receive a fair hearing, whether the decisions were supported by substantial evidence was irrelevant. Even if the record evidence supported the decisions, the evidence may well have been different had the hearings been fair. (*Clark, supra,* 48 Cal.App.4th at p. 1173, fn. 22; *Gates v. Department of Motor Vehicles* (1979) 94 Cal.App.3d 921, 926.)

Second, as a general rule, where determinative powers are vested in a local agency and the court finds the agency conducted an unfair hearing, the court must remand the matter to the agency for proper proceedings and may not decide the matter on the merits itself. (E.g., *Johnston v. Trustees of Cal. State University & Colleges* (1984) 151 Cal.App.3d 1003, 1012.) However, the rule has exceptions. Where the record of the administrative proceedings requires as a matter of law that a particular determination be made, the court need not remand and may simply order the agency to carry out its legal obligation. (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 677; *Ross Gen. Hosp., Inc. v. Lackner* (1978) 83 Cal.App.3d 346, 354; *Carlton v. Department of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1434; *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal.App.4th 1409, 1416 [after two board decisions were reversed for insufficient evidence, matter was remanded to trial court to determine amount of rent increase and then order board to adopt its decision].) Under another

exception, the trial court has the inherent power to dismiss the administrative proceedings where it finds unreasonable delay and resulting prejudice. (See *Gates v. Department of Motor Vehicles, supra,* 94 Cal.App.3d at p. 925.)

In *Gates,* the Department of Motor Vehicles (DMV) revoked Gates's vehicle dismantler license for various violations of the Vehicle Code. Gates petitioned for a writ of administrative mandate ordering the DMV to set aside its decision. The trial court found there had been an unreasonable delay between the time the DMV discovered the facts justifying the revocation and the time it commenced revocation proceedings, and Gates had been prejudiced by the delay. The court concluded the delay prevented Gates from getting a fair hearing and dismissed the proceedings. (*Gates v. Department of Motor Vehicles, supra,* 94 Cal.App.3d at pp. 923-924.) The appellate court held that the trial court had the inherent power to dismiss administrative proceedings where there had been an unreasonable delay which had prejudiced the petitioner. Further, the trial court's decision would be reversed only on a showing of abuse of discretion resulting in a miscarriage of justice. (*Id.* at p. 925.)

Analogously, in this case, the trial court did not abuse its discretion in exercising its inherent power to dismiss the administrative proceedings. The court found that "because of the burdensome expense and delay caused by [the] due process deprivation," a rehearing under section 1094.5 was an inadequate remedy. In other words, the Commission's arbitrary and unreasonable

application of the Ordinance in the four original proceedings resulted in burdensome expense and delay amounting to a deprivation of substantive and procedural due process. Remanding the 1988, 1989 and 1990 rent review matters for fair hearings in 1994 under a new ordinance and different procedures[7] would only increase the Gallands' expenses, and thus the tenants' rents, and further delay a final resolution of the case. The trial court's implied finding that remand would work an injustice rather than remedy one is amply supported by the record. Clovis argues that remand to determine the reasonableness of the rent increases is feasible, but it has not demonstrated that the trial court abused its discretion in dismissing the administrative proceedings under the circumstances.

Third, Clovis's contention that the trial court was not authorized under section 1094.5 to determine the merits of the rent increases de novo is a red herring. The court did not determine whether the noticed rent increases were reasonable under the Ordinance. It heard evidence to ascertain the damages the Gallands were due under section 1983 for the violations of their due process rights. Those damages included compensation for lost rents, i.e., the difference between the rent approved by the Commission and the rent required to provide the Gallands a fair return. The trial court did not violate any proscription under section 1094.5 in proceeding as it did.

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[7] The revised Ordinance, adopted in 1993, provides for minimum annual rent increases tied to the CPI. It replaced the Commission with a hearing officer and eliminated an appeal to the council.

4. *Kavanau* does not compel reversal of the award of lost rent damages against Clovis.

In *Kavanau, supra,* 16 Cal.4th 761, an apartment house owner incurred expenses improving the property and applied for a rent increase. The Santa Monica Rent Control Board granted an increase but required that the rent be increased gradually over an eight-year period subject to the board's rule that total increases not exceed 12 percent a year. In a prior action, the Court of Appeal had concluded that the 12 percent limit deprived Kavanau of a fair return and ordered the board not to apply the limit to his application for rent increases. (*Kavanau v. Santa Monica Rent Control Bd., supra,* 19 Cal.App.4th at p. 736.) Subsequently, Kavanau filed this action to recover damages stemming from the temporary application of the limitation. He alleged causes of action for inverse condemnation and for a deprivation of due process (section 1983). The trial court granted the board's demurrer. (*Kavanau, supra,* 16 Cal.4th at pp. 766-768.)

The Supreme Court questioned the appellate court's reasoning that application of the 12 percent limit to Kavanau's petition for rent increases violated his due process rights. However, the judgment in that case was final so the court accepted as true the conclusion that application of the limit deprived Kavanau of a fair return and thus violated his right to due process. (*Kavanau, supra,* 16 Cal.4th at pp. 777-779, 781.) Kavanau abandoned his section 1983 claim for damages on appeal, choosing to focus on his claim for inverse condemnation damages. (*Kavanau, supra,* at p. 780.)

The *Kavanau* court concluded it need not decide whether a rent regulation that violates a property owner's right to due process also constitutes a regulatory taking. Assuming it might, the availability of an adequate remedy for the due process violation obviated the taking. The adequate remedy was a valuable benefit that satisfied the takings clause. (*Kavanau, supra,* 16 Cal.4th at p. 782.) The court reasoned, since due process required that future rent increases must enable the owner to achieve a fair return, the rent board, when setting rent ceilings, had to consider the cost to Kavanau of any confiscatory rent ceilings the board had previously imposed. Thus, "irrespective of whether section 1983 would have afforded Kavanau a remedy for the due process violation, his continuing right to an adjustment of future rents can provide an adequate remedy." (16 Cal.4th at p. 783.) This remedy placed the cost of compensating Kavanau on the tenants who benefited from the unconstitutionally low rents and avoided imposing a burden on the court to determine appropriate rent in order to measure damages. (*Id.* at p. 784.)

The court noted, if the landlord promptly challenged the confiscatory rent setting, and sought a stay of that order during litigation, lost rents, and thus any future rent adjustments, were likely to be relatively small. On the other hand, a landlord who permitted large losses to accumulate could not complain if market forces prevented him from recouping those losses. (*Kavanau, supra,* 16 Cal.4th at p. 785.) The court did not decide what alternative remedy might be appropriate if a landlord established that future rent adjustments were unavailable. But, the court held, before a landlord could allege

such unavailability, he must petition for those adjustments, the rent board must determine, subject to judicial review, their appropriate amount, and he must attempt to impose them. (*Ibid.*)

Subsequently, in *Yee v. Mobilehome Park Rental Review Bd., supra*, 62 Cal.App.4th 1409, the court applied *Kavanau* to a mobilehome park owners' claim for damages for "lost profits" during the period when they were denied sufficient rents to receive a fair return. In earlier proceedings, the appellate court found that the rent control board's decision, which authorized lower rent increases than requested by the Yees, was not supported by substantial evidence. After the Yees eventually were awarded the requested rent increase, they sought damages. The trial court found the Yees had lost $591,415 in rents, but denied their request for damages on the grounds the rent board was immune from liability under Government Code section 820.2 and the park tenants were not parties to the action. (62 Cal.App.4th at pp. 1416-1417.)

The Court of Appeal affirmed. Assuming without deciding that the Yees' lost profits claim amounted to a due process violation, *Kavanau*'s remedy applied. Regardless of whether section 1983 would have provided the Yees relief for the due process violation, their continuing right to an adjustment of future rents provided an adequate remedy. (*Yee v. Mobilehome Park Rental Review Bd., supra*, 62 Cal.App.4th at pp. 1421, 1424-1425.) The Yees, like Kavanau, could recover the lost rents by a request to the rent control board for an adjustment of future rents to reflect the past deficiencies. (*Id.* at p. 1425.) The ongoing process of setting rent ceilings dispelled the due process violation. (*Id.* at p. 1427.)

Clovis submits *Kavanau* and *Yee* support its claims that the lost rent damages must be paid by the tenants through future rent adjustments and are not a proper element of damages against the public entity. The Gallands contend *Kavanau* does not apply in this section 1983 case. The Gallands have the better argument.

Unlike this case, *Kavanau* and *Yee* do not involve viable section 1983 claims. Kavanau abandoned his civil rights claim on appeal, and the *Yee* court determined the rent board was immune from section 1983 liability under Government Code section 820.2. Thus, in concluding that irrespective of whether section 1983 would have afforded the landlords relief, the right to future rent adjustments provided an adequate remedy, neither court addressed whether an adequate state remedy precluded an alternative remedy under section 1983 for the substantive due process violation. That is the issue before this court.

The purpose of damages under section 1983 is to compensate the plaintiff for injuries caused by the deprivation of constitutional rights. (*Farrar v. Hobby* (1992) 506 U.S. 103, 112.) Section 1983 was intended to provide a remedy for violations of civil rights where the state remedy, though adequate in theory, is not available in practice. Thus, overlapping state remedies are generally irrelevant to whether the plaintiff is entitled to damages under section 1983. (*Zinermon v. Burch, supra,* 494 U.S. at p. 124.) Under section 1983 and *Zinermon*, the trial court properly awarded the Gallands lost rents damages from Clovis as an element of their injuries caused by Clovis's substantive due process violations. Nothing in *Kavanau* precludes that award in this case.

In addition, *Kavanau* is distinguishable because it involved a "takings" claim rather than a deprivation of due process claim. Takings claims require the plaintiff to attempt to obtain compensation before the claim is ripe. (*Kavanau, supra,* 16 Cal.4th at p. 783.) Substantive due process claims brought under section 1983 are ripe at the time of harm, and the plaintiff need not seek compensation under state remedies. (*Zinermon v. Burch, supra,* 494 U.S. 113.) Thus, *Kavanau*'s rule that the plaintiff must seek compensation through the rent review process is inapplicable to the Gallands' right to recover for denial of substantive due process under section 1983.

Moreover, certain policy consideration underlying the *Kavanau* future rent adjustment remedy to compensate for lost rents do not apply in this case. For example, to the extent Clovis's irrational application of the Ordinance resulted in rents insufficient to provide the Gallands a fair return, the tenants in this case, like the tenants in *Kavanau,* received a corresponding benefit and should bear the financial burden of correcting the error. However, Kavanau's lost rent losses and thus the future rent adjustments were probably relatively small. (*Kavanau, supra,* 16 Cal.4th at p. 782.) In contrast, the Gallands' lost rents and interest as of 1995 exceeded $235,000. Responsibility for the substantial accumulation of lost rent damages lies with Clovis rather than the Gallands or the tenants because Clovis's delay in issuing final decisions and preparing the administrative record precluded the parties from obtaining more timely judicial review.

Additionally, the lengthy delays in this case and the fact that many of the Woods' tenants are elderly render

Kavanau's remedy less likely to place the cost of compensating the Gallands on those tenants who benefited from the confiscatory rents in 1988, 1989 and 1990. Finally, the long and tortured path this case has taken to date militates against sending the matter back for further administrative proceedings addressing these ancient claims.

Accordingly, *Kavanau* and *Yee* do not compel reversal of the award of lost rent damages against Clovis.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

Thaxter, J.

WE CONCUR:

Dibiaso, Acting P.J.

Buckley, J.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

ROGER AND VIRGINIA GALLAND, Plaintiffs and Petitioners, vs.	Case No. 418831-4 AMENDED JUDGMENT (Filed Jul. 12, 1996)
CITY OF CLOVIS, CLOVIS CITY COUNCIL, CLOVIS MOBILE HOME RENT COMMISSION, Defendants and Respondents.	DEPT: 61 HON. GARY KERKORIAN, JUDGE

After due consideration of the record, evidence and argument presented at the trial of this matter and for the reasons stated in the Statement of Decision Re: Liability, Damages and Writ of Prohibition entered herein, and after due consideration of the record, evidence and argument presented regarding the defendants' post-trial motion to vacate the judgment and enter new judgment and plaintiffs' post-trial motion for attorneys fees and out of pocket costs, and for the reasons stated in the Court's Ruling on Defendant's Motion to Vacate Judgment and

Enter New Judgment to Correctly Reflect Post Judgment Interest Rate and in the Court's Order Re: Plaintiffs' Post Trial Motion for Attorneys Fees, Expert Witness Fees and Out of Pocket Costs, the Court finds the Judgment herein should be vacated and a new Amended Judgment in favor of the plaintiffs should be entered as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs Roger and Virginia Galland, shall have and recover from defendant, the City of Clovis, damages in the amount of $484,691.00, together with pre-judgment interest from January 1, 1989 to September 1, 1995 in the amount of $155,615.00 for a total of $640,306 with interest at the rate of seven percent per annum from the original date of Judgment, October 10, 1995, until paid.

Additionally, this Court awards attorneys fees in the amount of $378,955.50, with interest at the rate of seven percent per annum from April 1, 1996. Plaintiffs are also awarded costs of suit pursuant to Code of Civil Procedure section 1033.5. Plaintiffs are to file a cost bill as required in Code of Civil Procedure section 1033.5.

IT IS HEREBY ADDITIONALLY ORDERED, ADJUDGED AND DECREED that the administrative decisions of the Clovis Rent Review Commission and the Clovis City Council regarding the rent increases at the Woods Mobile Home Country Club for the years 1988 through 1990 are hereby vacated and any administrative proceedings thereon dismissed and that a Writ of Administrative Mandate issue directing that this be so, pursuant to this Court's Amended Statement of Decision dated August 5, 1994.

IT IS HEREBY ADDITIONALLY ORDERED, ADJUDGED AND DECREED that the proceedings of the Clovis Rent Board and/or the Clovis City Council regarding the rent increases for 1991 and 1992 be halted and dismissed and that a Writ of Prohibition issue directing that this be so, pursuant to this Court's ruling of February 16, 1993, on file herein.

Dated: July 12, 1996

/s/ GARY KERKORIAN
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM AND CONTENT:

/s/ David Wolfe 7/11/96
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

Case No. 418831-4

ROGER AND VIRGINIA GALLAND,

Plaintiffs and Petitioners,

vs.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, CLOVIS MOBILE HOME RENT COMMISSION,

Defendants and Respondents.

_____/

STATEMENT OF DECISION RE: LIABILITY, DAMAGES AND WRIT OF PROHIBITION

DEPT: 72
HON. GARY KERKORIAN, JUDGE

1. The plaintiffs, Roger and Virginia Galland ("Galland"), seek damages for Inverse Condemnation and for having been denied Substantive and Procedural Due Process under the Constitution and/or 42 U.S.C. 1983; and also allege an action for Declaratory Relief and four Petitions for Writs of Administrative Mandate.

2. This Court has already issued its Amended Statement of Decision on the issues of defendants' liability on August 5, 1994, in which it vacated the administrative proceedings that were the subject of the four Petitions for Writs of Administrative Mandate and found that defendants had violated plaintiffs' rights to Substantive and Procedural Due Process. The Court held that Plaintiffs were entitled to damages under 42 U.S.C. 1983 for both Substantive and Procedural Due Process violations in the amount of the plaintiffs' loss of its fair return on investment caused by the arbitrary, unduly burdensome and unreasonable actions of the defendants, and for the amount of expenses and costs, including reasonable attorneys' fees, incurred by plaintiffs as a result of the arbitrary, unduly burdensome and unreasonable actions of the defendants. The Court hereby incorporates the August 5, 1994 Amended Statement of Decision herein, and has attached it hereto as Appendix A.

3. The matter relating to plaintiffs' damages, expenses and attorneys' fees was heard on December 6, 1994, April 11, 1995, and May 8-11, 1995 by Judge Gary R. Kerkorian in Department 72 of the above court. Attorney Jaquelynn Pope appeared for the plaintiffs and attorneys Jerome Behrens and David Wolfe appeared for the defendants. Evidence having been presented and the parties' arguments having been made by written briefs, the matter stood submitted on June 21, 1995.

4. The purpose of damages under 42 USC 1983 is to compensate plaintiffs for injuries caused by the deprivation of constitutional rights (*Farrar v. Hobby* (1992) 113 S.Ct. 566, 573). Thus the measure of damages is computed similarly to tort damages, and should provide sufficient

compensation to make plaintiffs whole. The Court therefore now finds and orders that defendants are liable to plaintiffs as follows:

A. For plaintiffs' cost of participating in defendants' 1988, 1989 and 1990 rent review administrative proceedings, including attorneys' fees for those proceedings, in the sum of $254,860.00 less a reasonable sum to participate in each of said proceedings. The Court finds from the evidence offered that plaintiffs expended $254,860.00 on the administrative proceedings at issue here and finds further from the evidence offered that $2,325.00 would have been a reasonable amount for each such year. Therefore, for the years 1988 through 1990 a total of $6,975.00 is to be deducted from plaintiffs' administrative hearing costs for a net damage amount of $247,885.00.

B. For lost rents from 1988 through March 31, 1995, in the amount of $236,806.00. The Court finds from the evidence offered that a fair return on investment for plaintiffs would be between 20 and 25 percent, where return on investment is calculated using the methodology stipulated to by the parties.[1]

The Court finds that plaintiffs have not obtained a fair return from 1988 through the present and that the rent increases at issue were necessary to help plaintiffs

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[1] The parties stipulated orally and in writing that the amount of the investment would be determined by adjusting the actual cash invested and capital contributions by the U.S. Shelter Index. This amount is then divided by the cash flow (profit after debt service) to derive the return on investment for each year.

obtain a fair return. The Court finds further from the evidence that the plaintiffs have imposed reasonable rent increases in the years since 1990, and that there has been no failure to mitigate damages on the part of the plaintiffs.

C. The Court denies plaintiffs' claim for alleged financing costs in the amount of $303,690.00. While the Court understands the plaintiffs' conceptual damages through the year 2008, the lost rents are now "collected" and will, as a result of interest on same to date of judgment and a reasonable yield thereon through the year 2008, more than offset plaintiffs' alleged projected financing expenses through March 31, 1995[2] and through the year 2008.[3]

D. Plaintiffs are entitled to prejudgment interest for their lost rents and administrative hearing costs beginning on January 1st of the year following the year the costs were incurred at the rate of seven percent simple to date of judgment. Although the "lost rents" relate to the plaintiffs' relationship with the tenants, the damages awarded herein are not based upon contract but upon the due process violations that the Court has previously identified and are thus in the nature of a tort, not contract. Interest is to be calculated by plaintiffs' counsel and submitted to the Court for inclusion in the Court's judgment.

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[2] $96,097.00 +/−.

[3] $303,690.00

E. The issue of plaintiffs' attorneys' fees incurred in connection with this action has not been addressed and is reserved.

5. Prior to trial, on or about November 16, 1994, this Court granted plaintiffs' motion to exclude testimony from defendants' expert witness due to the failure of defendants to designate that expert pursuant to the provisions of Code of Civil Procedure section 2034. As set forth in the Court's Order on Plaintiffs' Motion to Exclude Testimony of Defendants' Expert issued November 14, 1994, this Court found that defendants failed to timely designate their expert and as a result gained an unfair advantage over plaintiffs and acted unreasonably by taking the deposition of plaintiffs' designated expert and then attempting, after defendants received the transcript of the deposition of plaintiffs' expert, to designate their own expert. At trial, defendants attempted to introduce testimony from two experts, Gene Deetz and Kenneth Hopper, which they characterized as rebuttal testimony. Plaintiffs objected to the proposed testimony on the grounds that it was improper rebuttal and was barred by the Courts' prior order. After extensive voir dire, this Court found that the proposed testimony was improper rebuttal in that it did not impeach the testimony of plaintiffs' expert and was impermissible expert opinion. This Court's further reasons for barring the proposed expert testimony were stated on the record at trial and are included herein by reference.

6. On January 21, 1993 plaintiffs moved this Court for a Peremptory Writ of Prohibition ordering the City of Clovis to halt all proceedings before the Clovis Rent Review Commission regarding the 1991 and 1992 rent

increases. This Court granted the motion and found that Clovis' delay in reviewing the increases had been unreasonable and had prejudiced plaintiffs. The court's reasoning is further set forth in its Ruling on Motion for Peremptory Writ of Prohibition dated February 16, 1993 and said Ruling is incorporated herein by reference and attached hereto as Appendix B.

Dated: 10/5, 1995

/s/ GARY R. KERKORIAN
JUDGE OF THE
SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FRESNO

ROGER and VIRGINIA GALLAND, Plaintiffs & Petitioners, v. CITY OF CLOVIS, et al., Defendants & Respondents. THE WOODS TENANTS' ASSOCIATION, Real Parties in Interest.	No. 418831-4 Dept. 16 AMENDED STATEMENT OF DECISION

The plaintiffs, Roger and Virginia Galland ("Galland"), seek damages for inverse condemnation and for

having been denied substantive and procedural due process under the Constitution and/or 42 U.S.C. 1983; and also allege an action for Declaratory Relief and four petitions for Writs of Administrative Mandate.

The subject matter of the lawsuit concerns four administrative proceedings before the Clovis Rent Review Commission (Commission) and the Clovis City Council (Council) arising out of the City's enforcement of the Clovis Mobile Home Rent Review Ordinance (Ordinance). Plaintiffs are the owners of the Woods Mobile Country Club (owners) in Clovis, California. The essence of the plaintiffs' complaint is that the arbitrary, irrational and unfair manner in which the Commission and Council applied the Ordinance to plaintiffs' requests for rent increases made the process unreasonably costly, oppressive and burdensome. As a result, in connection with the plaintiffs' 1988, 1989 and 1990 applications to increase rent, the owners contend that they were denied procedural and substantive due process. On April 4, 1994, the matter was submitted for decision on the briefs filed by the parties and the administrative record relating to the hearings during the three years.

The Court having reviewed the plaintiffs' trial brief, the defendants' response thereto, the plaintiffs' reply brief, and the administrative record, FINDS AND ORDERS AS FOLLOWS:

A. PLAINTIFFS' CAUSE OF ACTION FOR DENIAL OF DUE PROCESS AND VIOLATION OF RIGHTS PROTECTED BY 42 U.S.C. § 1983.

1. Concerning the petitioners' 1988, 1989 and 1990 requests for a rent increase and the hearings conducted in connection therewith, the Court finds that the manner in which the Commission and the Council applied and administered their Ordinance, violated petitioners' procedural and substantive due process rights by:

a. making the rent review process so time consuming, burdensome and expensive that the potential benefits of participating in the process were nonexistent and illusory, all of which the Commission and Council were well aware, but nevertheless, continued to perpetuate. Moreover, the Council's delay in presenting their final decision for each of the hearings added to the unduly burdensome and oppressive nature of the proceedings and to the illusion;

b. having considered and relied upon, without notice to plaintiffs, ex parte evidence;

c. overly broad, unduly burdensome, arbitrary, unreasonable and inconsistent requests for information having no substantial relation to the legitimate purposes of rent control or the public health, safety, morals or public welfare; as well as a failure to provide specific written guidelines or criteria relating to the proof needed to establish what "investment" meant and what would be or would not be a "fair return" on investment.

d. not allowing petitioner to include as an item of expense, when determining profit or "fair rate of return," the expenses incurred in previous years as a result of participating in the City's unduly burdensome and financially punitive rent review process, at

least as to expenses incurred in seeking increases that appeared reasonable, as is the case here.

2. The Court further finds that the matters referenced in paragraph 1 constitute both procedural and substantive due process violations.

The Court having found that due process violations occurred, the nature of plaintiffs' remedies must be addressed.

B. THE LAW RELATING TO FEDERAL AND STATE CONSTITUTIONAL DUE PROCESS DEPRIVATION AND 42 U.S.C. § 1983 CIVIL RIGHTS DAMAGES.

To the extent that the deprivation of the owners' property rights was a violation of "substantive due process" damages are available to a plaintiff under section 1983. To the extent that mere inadequacies in the procedures themselves is the cause of plaintiffs' harm, there appears to be no damage remedy under section 1983, because the post-deprivation remedy of administrative writ of mandate is generally adequate to correct the errors flowing from the improper procedures (*PFZ Prop. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28, 31).

However, violations of "substantive due process" do not require that post-deprivation state remedies be invoked; in such cases, overlapping state law remedies are irrelevant to the section 1983 cause of action (*Zinermon v. Burch* (1990) 494 U.S. 113, 110 S.Ct. 975, 982-3). But where the deprivation is one of "procedural due process," the right to a section 1983 action would depend upon the adequacy of post-deprivation remedies provided by state or tort law (*Zinermon, supra,* p. 983).

A "substantive due process" claim exists under section 1983 where the government's actions causing a deprivation of protected rights (e.g., property) were "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare" (*Sierra Lake Reserve v. City of Rocklin* (9th Cir. 1991) 938 F.2d 951, 957). Arbitrary, irrational and unfair government actions not related to the legitimate purposes of rent control, and which deprive a landlord of a fair and reasonable return on his investment may constitute a "substantive due process" violation. (*Id.*, p. 957).

In this case, and to the extent a deprivation may be classified solely procedural, because of the burdensome expense and delay caused by defendant's due process deprivation, the Court finds a rehearing for plaintiff under Code of Civil Procedure section 1094.5 would be patently inadequate.

C. DAMAGES.

As a result, the Court concludes damages are available to plaintiffs under section 1983 for both substantive and procedural due process violations, for the amount of the owners' loss of its fair return on investment caused by the arbitrary, unduly burdensome and unreasonable actions of the defendants, and for the amount of expenses and costs, including reasonable attorneys' fees, incurred by plaintiffs as a result of the arbitrary, unduly burdensome and unreasonable actions of the defendants. (See, *Sierra Lake Reserve, supra*).

D. PLAINTIFFS' CAUSE OF ACTION FOR INVERSE CONDEMNATION, WRITS OF MANDATE AND INJUNCTION.

1. Inverse Condemnation. The Court concludes that plaintiffs failed to establish a claim under the theory of Inverse Condemnation. Plaintiffs allege an unconstitutional, confiscatory, regulatory taking occurred by reason of the Commission and Council's refusal to convert and compare invested dollars with constant dollars; and, as a result, plaintiffs wrongfully suffered a diminution at value of the mobile home park.

The Court disagrees. There was no "taking" of property as that term is applied in inverse condemnation cases. Moreover, inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged. (*Agins v. Tiburon* (1979) 24 Cal.3d 266).

2. Plaintiffs' Actions for Administrative Writs of Mandate, Declaratory Relief and Injunction.

Having found substantive due process violations occurred and that Code of Civil Procedure section 1094.5 would not provide an adequate post deprivation remedy in this case, the Court orders the Commission decisions vacated and the administrative proceedings dismissed. The effect of this order, if any, on the real parties in interest shall be determined after determination of the damages arising from the section 1983 violations.

The Court declines to address, as moot or duplicative, any other issues arising out of plaintiffs' causes of action for writs of administrative mandate, declaratory relief and injunction.

E. JUDICIAL NOTICE.

The Court has received from defendants a request to take judicial notice of the defendants' proposed new Mobile Home Park Rent Review Ordinance. The Court declines such request on the basis that its adoption is speculative; and even if adopted its provisions would be irrelevant to these proceedings.

F. STATUTE OF LIMITATIONS.

Defendants waived the statute of limitations defense by failing to plead it affirmatively. The stipulation between the parties did not contemplate undisclosed new matters. Moreover the defendants' delay in providing the administrative record for 1988, 1989 and 1990, and the co-extensive delay in issuing final decisions for the 1989 and 1990 administrative proceedings prevented the causes of action on the 1988 proceedings from accruing and/or tolled the statute of limitations for that period of time.

The matter of plaintiffs' damages, attorney fees and expenses, at the request of the parties, has been re-set for hearing on December 6, 1994, in this Department at 1:30 p.m. The hearing will be limited to the issue of plaintiffs' damages, attorney fees and expenses.

DATED this 5th day of August, 1994.

/s/ Gary R. Kerkorian
GARY R. KERKORIAN
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FRESNO

ROGER and VIRGINIA GALLAND, Plaintiffs & Petitioners, v. CITY OF CLOVIS, CLOVIS CITY COUNCIL, CLOVIS MOBILE HOME RENT COMMISSION, Defendants & Respondents. THE WOODS TENANTS' ASSOCIATION, Real Parties in Interest.	No. 418831-4 Dept. 16 RULING ON MOTION FOR FOR [sic] PEREMPTORY WRIT OF PROHIBITION

This matter was heard on January 21, 1993 by Judge Gary R. Kerkorian at 1:30 p.m. in Department 16 of the above Court. Ms. Pope appeared for the moving parties, the petitioners, Roger and Virginia Galland, and Mr. Behrens appeared for the respondents, the City of Clovis, et al. Written argument, points and authorities, and declarations having been submitted by the parties and the Court having reviewed same, observes, finds and orders as follows:

The issue here is whether the Clovis Rent Review Commission has lost jurisdiction to review rent proceedings. The owners cite two leading cases on municipal rent control ordinances; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001, and *Carson*

Mobilehome Park Owners' Ass'n. v. City of Carson (1983) 35 Cal.3d 184, 197 Cal.Rptr. 284, 672 P.2d 1297. Both cases considered delays involved in rental adjustments and whether or not they were unconstitutionally confiscatory. The *Berkeley* rent control ordinance was held to be unconstitutional on its face because it failed to provide for mechanisms to adjust rents within a reasonable amount of time. 17 Cal.3d at 169. The *Carson* rent control ordinance was held to be permissible.

Carson distinguished the *Berkeley* scheme on two grounds: (1) In *Carson*, the rent control ordinance only requlated [sic] 32 mobilehome parks as compared to the 16,000 units in Berkeley (35 Cal.3d at 192), and (2) if the Carson Board failed to act within 105 days an interim increase would be automatically granted 935 Cal.3d at 193).

Clovis' rent control ordinance does not provide for the interim increase safety net that Carson's provides. The Supreme Court noted their concern for the lack of a safety net in *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 691 n. 52 [209 Cal.Rptr. 682, 693 P.2d 261]: "Whether individual landlords might prove a denial of due process because of delays exceeding the 120-day time limit is a question of great concern, but it is not before us at this time." *Fisher's* worst case scenario has occurred in the case at bar.

Clovis provides two non-procedural arguments: (1) the time limits of the rent control ordinance are directory and not mandatory, and (2) any delay was not unreasonable insofar as the owners either initiated or were party to any delays. Clovis' other two arguments (non-verified

petition, exceeding 15 page limit in violation of CRC Rule 313) have been persuasively addressed in owner's reply points and authorities.

1. Time Limits Are Directory And Not Mandatory

In an agency proceeding, the petitioner may motion for dismissal based on unreasonable delay in the proceedings when accompanied by prejudice. *California Administrative Mandamus* § 4.49 (2d ed. 1989). The owners' prejudice includes an inability to refinance the property based on uncertainty of income and the possibility of being ordered to rebate a substantial sum regarding the 1991 and 1992 rent increases. (See Pope Supp. Decl., Ex. C, Chamberlain Decl.) Since interest rates can fluctuate significantly even within a year's period of time, the owner's refinance argument has merit. What is implicit in this entire proceeding is that the Commission cannot meaningfully review a proposed rent increase until all prior rent increase proceedings have been concluded. As was noted in this Court's order regarding the standard of review at trial, the owners may raise the rent at their leisure but the amount of rent increase is not vested unless the tenants waive their right to petition against the rent increase or, subsequent to a petition, the Commission approves the rent increase (Clovis Muni. Code § 5-13.06). Even if the Commission approves the rent increase, the Commission's rulings are subject to appeal to the City Council (5-13.07).

Clovis cites *Edwards v. Steele* (1979) 25 Cal.3d 406, 158 Cal.Rptr. 662, 599 P.2d 1365, which offers a test to determine whether or not time limits are directory or mandatory: (1) would holding a time limitation mandatory result in defeat or promote the purpose of the enactment, and/or (2) are there any penalty or consequences in the code at issue which suggest that the time limitations are mandatory? 25 Cal.3d at 410. Clovis is correct that application of either test does not conclusively show that the time limits in Clovis Municipal Code are mandatory.

Test (1) could go either way in that the purpose of the code is both "to protect tenants from unreasonable rent increases while at the same time recogniz[e] the need of mobile home park owners to receive a fair return on their investment." Clovis Municipal Code § 5-13.01. Although there are no penalties or consequences on the face of the code regarding the Commission, the code suggests that if the tenants do not file a timely petition pursuant to 5-13.06(b) they waive their rights to do so and if any party fails to appeal a Commission ruling pursuant to 5-13.07 they waive their right to do so.

Edwards, a zoning application, suggests that the Clovis Municipal Code is directory although the Court feels it is inappropriate for the Commission to take the position that time limits are directory for the commission but mandatory for all other interested parties. *Edwards* suggests that the inability for a board to muster a quorum is a permissible reason for an administrative body to act beyond a stated time limit. 25 Cal.3d at 413. More significantly, *Edwards* suggests that actual prejudice by reason of delays may be a factor in ruling on a writ in favor of petitioner. 25 Cal.3d at 410-1.

2. Reasonableness of Delays

Clovis generally argues that any delay in the rent proceedings are reasonable in light of: (a) for an extended period of time the Commission did not have the necessary three at-large members to constitute a quorum (Oppo. P&A pp. 15-16), and (b) the owners initiated the delay.

Absent actual prejudice, Clovis is correct that lack of a quorum constitutes a valid ground for delay in proceedings. See *Edwards* discussion, *supra*. Clovis minimizes the fact that the time period in which there was no quorum was 13 months. (Opp. P&A 4:1-17, Reply P&A 7:1-6). Although the Clovis Municipal Code, on its face, would probably withstand constitutional challenge, pursuant to *Berkeley, Carson,* and *Fisher, Carson* provided additional protection to the landlords and *Fisher* implicitly gave courts permission to intervent [sic] in the presence of prejudicial delay.

Clovis suggests that owners initiated the delays in the proceedings and/or stipulated to all continuances and therefore have waived their right to raise the issue unreasonable delay in this writ. It is true that on June 10, 1991 owners sent a letter to then Clovis City Attorney Leland Stephenson repeating their objection to a proposed briefing schedule for the 1991 rent review proceedings on the ground that the 1989/90 rent review proceedings were not final. (Wolfe Decl. Ex. 4) That letter does suggest that both parties agreed to a continuance pending the since-continued August 19, 1991 trial.

For whatever reason(s), the August 19, 1991 trial has been continued to April 20, 1993. Although Clovis asserts that owners continued to waive time limits regarding the Commission's duty to issue written decisions due to settlement negotiations (Oppo. P&A 5:23-6:4), the record reveals not only that owners regularly contested the Commission's failure to observe deadlines (owners motioned for sanctions on October 29, 1991 and on January 24, 1992 but that both the Commission and the City Council chronically failed to meet stipulated time limits (i.e., failure of Commission to file written decision; City Council was nearly a month late in issuing its written opinion on appeal).

The Court agrees with owners that the Commission cannot meaningfully review a proposed rent increase when prior rent increases have yet to be settled. Although case law has ruled that rent review proceedings inherently are subject to delay (*Carson*, 35 Cal.3d at 193), the Clovis Municipal Code does not offer any protection to perpetual delay such as the type in this case. Not only have owners met their burden in showing unreasonable delay and prejudice, but Clovis has failed to show lack of prejudice and, perhaps more significantly, tenants have not filed any position papers despite being active in the litigation of the sister case *Wyland v. Planned Management*. See *California Administrative Mandamus* § 4.49 (shifting of burden of proof regarding excusable delay and lack of prejudice to petitioner).

The Clovis Municipal Code does not work. If the Commission is having a difficult time finding at-large candidates to serve on the Commission to constitute a quorum then they should revise the composition of the

Commission or the manner in which they qualify candidates, Cases do hold that lack of a quorum constitutes permissible delay; Clovis, however, does not cite any case where a delay was 13 months. Compare *Ursino v. Superior Court* (1974) 39 Cal.App.3d 611, 618 [114 Cal.Rptr. 404) (delay of 40 days permissible.)

Accordingly, due to unreasonable delay in the proceedings and a showing of prejudice to the owners, this Court grants the owners' motion for a Peremptory Writ of Prohibition halting all proceedings before the Clovis Rent Review Commission regarding the rent increases at the Wood's Mobile Country Club for the year 1991 and 1992.

DATED this 16th day of February, 1993.

/s/ Gary Kerkorian
GARY R. KERKORIAN
Judge of Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FRESNO
1100 Van Ness, P.O. Box 1628
Fresno, California 93717-1628

TITLE OF ACTION: GALLAND vs. CITY OF CLOVIS, et al.
CASE NUMBER: 418831-4

I certify that I am not a party to this cause and that a copy of the attached was mailed first class, postage prepaid, in a sealed envelope as addressed as shown

below, and that the mailing of the foregoing and execution of this certificate occurred at Fresno, California on

(Date): 2/18/93 Clerk of Court, By /s/ R. Ley Deputy

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CLERKS'S CERTIFICATE OF MAILING

Court of Appeal Fifth Appellate District – No. F025257
S080670

IN THE SUPREME COURT OF CALIFORNIA

En Banc
(Filed Mar. 21, 2001)

ROGER GALLAND et al., Respondents,

v.

CITY OF CLOVIS et al., Appellants.

Petition for Rehearing DENIED.

Baxter, J., did not participate.

Opinion modified.

Brown, J., and Jones, J.* are of the opinion the petition should be granted.

* Hon. Barbara J.R. Jones, Presiding Justice, Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

/s/ George
Chief Justice

CLOVIS MUNICIPAL CODE

Sec. 5-13.06. Review and hearing process: Initiation.

* * *

(b) Upon the filing with the City Clerk of the written petition of more than fifty (50%) percent of the tenants of any mobile home park exceeding twenty-five (25) spaces, which tenants will be or have been within a ninety (90) day period subject to a rental or service charge increase, the Commission shall hold a hearing, no sooner than fifteen (15) days and no later than forty-five (45) days after the receipt of such petition by the City Clerk, at a place and time to be set by the Commission, to determine whether or not the rental or service charge increase is so great as to be an unreasonable increase. A reasonable continuance, not to exceed thirty (30) days, may be granted at the Commission's discretion.

* * *

(f) The Commission shall make a final decision no later than ten (10) days after the conclusion of its hearing on any petition. No rent adjustment shall be granted unless supported by the preponderance of evidence submitted at the hearing. All parties to a hearing shall be sent a written notice of the decision of the Commission and a copy of the findings upon which the decision is based. Such notice shall be effective on deposit in the United States mail.

* * *

(i) In evaluating the rent increase proposed or effected by the mobile home park owner, the Commission shall consider relevant factors including, but not limited

to, increased or decreased costs to the mobile home park owner attributable to utility rates, property taxes, insurance, advertising, governmental assessments, cost of living increases attributable to incidental services, normal repairs and maintenance, capital improvements, and the upgrading and addition of amenities or services, as well as a fair rate of return on investments and increased property values.

Supreme Court, U.S.
FILED
JUL 20 2001
OFFICE OF THE CLERK

No. 00-1903

In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have filed a brief that is skillfully written and entertaining to read. It does not, however, accurately portray the decision of the California Supreme Court. Utilizing rather flamboyant political rhetoric, petitioners seek to characterize this as a land use and takings decision when, in fact, it is a decision well within the mainstream of the law governing price control regulation in the highly regulated mobile home park industry.

There are two principal holdings in this case. First, the California Supreme Court articulated the standard a trial court must use for determining whether the application of price controls in a regulated mobile home park has resulted in confiscatory rent regulation. (Pet. App. 30-34.)[1] Second, the California Supreme Court articulated the standard a trial court must follow for determining whether the actual conduct of the administrative rent control proceedings is so arbitrary and burdensome as to amount to a violation of substantive due process. (Pet. App. 44-45.) It is critical to note that the California Supreme Court did not hold that confiscatory rent regulations were imposed, and did not hold that the conduct of the administrative rent control proceedings amounted to a violation of petitioners' substantive due process rights. Instead, the California Supreme Court remanded the case to the trial court to make these factual and legal determinations based upon the standards articulated in its decision. (Pet. App. 2, 30, 51, 57.) Petitioners' contention

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[1] The Appendices to the Petition for Certiorari are cited as "Pet. App. ___." The Appendices to this Brief in Opposition are cited as "App. ___."

that the City of Clovis imposed confiscatory rents and that petitioners have been denied relief under 42 U.S.C. § 1983 are wrong. These issues will be decided after further proceedings upon remand. There is no final judgment upon which this court may grant review. (28 U.S.C. § 1257; *Florida v. Thomas*, ___ U.S. ___, 121 S. Ct. 1905, 1908-1909 (2001); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 633 (1981).)

In addition, the California Supreme Court's decision does not conflict with the decision of another state court of last resort, a decision of a United States court of appeals, or relevant decisions of this Court. Nor has the California Supreme Court decided an unsettled question that needs resolution by this Court. There are no compelling reasons to grant review. (Supreme Court Rule 10.)

STATEMENT OF THE CASE

The City of Clovis respectfully submits that the published opinion of the California Supreme Court contains an accurate description of the proceedings below. The Gallands' statement of the case is misleading and inaccurate in a number of respects which are discussed below.

This case arises out of a dispute between the Gallands and the home owners in the Woods Mobile Home Park owned by the Gallands. The home owners are senior citizens on fixed incomes. Every year the Gallands impose rent increases on the home owners for renting pads in the park. At issue here are the rent increases imposed in 1988, 1989, and 1990.

As this Court noted in *Yee v. Escondido*, 503 U.S. 519, 523 (1992) the term "mobile home" is misleading. Mobile home owners have substantial investments in their homes and once placed on pads are usually never moved. If sold, the homes are sold in place. The California Supreme Court, relying upon research done by noted author Kenneth Baar,[2] observed that the immobility of mobile homes, the substantial investment of the mobile home owner, and the restriction on mobile home spaces, "has sometimes led to what has been perceived as an economic imbalance of power in favor of the mobile home park owners [ ] that has in turn led many California cities to adopt mobile home rent control ordinances [ ]." (Pet. App. 3-4.) The City of Clovis has such an ordinance.

In accordance with the City of Clovis' former ordinance, the home owners petitioned the then existing Rent Review Commission to review the 1988, 1989, and 1990 rent increases for reasonableness with the understanding that the Gallands were entitled to a fair return on their investment. (Pet. App. 163-164.) The former Rent Review Commission approved approximately 50% of the requested rent increases. Those rent increases were affirmed by the City Council. Pursuant to the former ordinance and a stay order issued by the trial court, the Gallands were entitled to collect all of the requested 1989 and 1990 rent increases pending the trial court's decision but opted not to do so.

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[2] Baar, *The Right to Sell the "Im" mobile Manufactured Home in Its Rent-controlled Space in the "Im" mobile Home Park: Valid Regulation or Unconstitutional Taking?*, 24 Urb. Law. 157 (1992).

The Gallands contend that the rent review process deprived them of fair hearings in violation of their procedural and substantive due process rights. They asserted a number of procedural errors, including inadequate notice of what evidence they needed to provide in order to prove that the rent increases were necessary for a fair return, the consideration of ex parte evidence, burdensome requests for information, and the rejection of uncontroverted expert evidence.[3]

The trial court rendered its initial decision in August 1994 finding that the *process* was arbitrary and unreasonable, depriving the Gallands of their procedural and substantive due process rights. (Pet. App. 20.) In October 1995, after a hearing on damages, the trial court separately held that the limited rent increases were *confiscatory* because the Gallands needed the rent increases to obtain a constitutionally guaranteed return of 20-25%. (Pet. App. 30.)

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[3] The Gallands assert that the first burdensome request for information occurred in August 1988 after the City Council approved an order for further proceedings which contained a list of detailed information that the Gallands should provide to justify the rent increases. (Pet. App. 8-9.) The record reflects that the Gallands had substantial input into the content of the order. The Gallands state at page 5 of their petition that Clovis compounded the burdensome request by initially providing one week to provide the requested information. This statement is wrong. The City Council issued the order for further proceedings on August 29, 1998. The Gallands were provided until October 14, 1998, to provide the information.

The California Supreme Court, relying upon precedent from this Court's recent decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and from the D.C. Circuit Court of Appeals in *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988), held that a substantive due process violation will exist only if the former Rent Review Commission or the City Council deliberately flouted the law when making their decisions. The California Supreme Court remanded the matter to the trial court to apply this standard.

On the confiscatory rent issue, the California Supreme Court held that the trial court made fundamental errors in concluding that the approved rent increases were confiscatory and remanded the matter to the trial court for reconsideration of this issue. To assist the court on remand, the Court provided considerable guidance as to what constitutes a confiscatory rate of return. (Pet. App. 2, 30-34.) If the trial court finds that the limited rent increases were confiscatory, the Court held, consistent with its earlier decision in *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761, 782-786 (1997), *cert. denied*, 522 U.S. 1077 (1998), that the matter should be remanded to the City of Clovis for a readjustment of the rents to eliminate the confiscatory effect.[4] If such a remand occurs, the procedures under Clovis' new rent control ordinance would apply. Clovis adopted a new ordinance in 1993, long before the trial court rendered its decision.

---

[4] If a readjustment of rents is not sufficient to compensate the Gallands, the Court concluded that the Gallands would be able to pursue a claim for compensation measured by an adequate rate of return. (Pet. App. 27, 36-37.)

(Pet. App. 4, 37.) Under the new ordinance, all matters are heard in accordance with strict time lines before a professional hearing officer, preferably with expertise in rental dispute mediation, selected with input from both sides. There is no rent review commission and there are no appeals to the City Council. (App. 1-7; Clovis, Cal., Ordinance 93-23 (eff. Dec. 1, 1993), Municipal Code §§ 5-13.14 through 5.13.16.)[5]

REASONS FOR DENYING THE WRIT–

1. There is No Final Judgment on the Issue of Whether the Rents Were Confiscatory or on the Issue of Whether the Rent Review Hearing Procedure Violated the Gallands' Substantive Due Process Rights.

The trial court will determine upon remand, by application of the guidelines articulated by the California Supreme Court, whether the rent ceilings imposed by Clovis were confiscatory. Any challenge before this Court based upon a confiscatory rent theory is premature. There is no final judgment upon this issue.

The trial court will determine upon remand, by application of the proper standard for gauging Constitutional injury as articulated by the California Supreme Court, whether the City violated the Gallands' substantive due process rights by any of the actions it took

[5] Contrary to the Gallands' contention, if this case goes back to Clovis, there will not be six hoops to jump through. (Pet. App. 8-9.) Nor will the case be remanded back to the same officials. (Pet. App. 14.)

during the rent review hearings. There is no final judgment upon this issue.

The Court does not have jurisdiction to grant the writ of certiorari because further proceedings are contemplated before there is a final judgment on the Constitutional issues. (28 U.S.C. § 1257; *Florida v. Thomas, supra,* 121 S. Ct. at pp. 1908-1909; *San Diego Gas & Electric Co., supra,* 450 U.S. at p. 633.)

2. Neither the Decision Below Nor the Record Raises the Questions Presented in the Petition.

The questions presented by the Gallands are premised on a trial court finding that the City imposed confiscatory rents by denying the Gallands a reasonable return. The California Supreme Court overruled this finding because of fundamental errors made by the trial court. (Pet. App. 2, 30-34.) Thus, missing from this case is the essential factual predicate for the questions presented. It is to be determined by the trial court upon remand whether the City imposed confiscatory rents or violated the Gallands' substantive due process rights.

3. The California Supreme Court Properly Concluded that in the Price Regulation Context there is No Constitutional Injury and No Section 1983 Cause of Action When the Availability of Rent Adjustments Would Eliminate any Confiscatory Rent Ceiling.

The California Supreme Court held, relying upon its earlier decision in *Kavanau, supra,* 16 Cal.4th at pp. 782-786, that no constitutional injury occurs when future rent adjustments can compensate for a confiscatory rent

ceiling. (Pet. App. 22-28.) The Court held that, in the context of price regulation, it is immaterial whether the alleged constitutional injury is phrased as a taking or as a violation of substantive due process. (Pet. App. 27.)

The California Supreme Court's holding is entirely consistent with this Court's decisions in price regulation cases dating back to 1930. (*United Railways and Electric Co. of Baltimore v. West*, 280 U.S. 234 (1930) (*United Railways*), *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942) (*Natural Gas Pipeline*), *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (*Hope Natural Gas*), *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (*Permian Basin*), *Federal Communications Commission v. Florida Power Corporation*, 480 U.S. 245 (1987) (*Florida Power Corporation*), *Duquesne Light Company v. Barasch*, 488 U.S. 299 (1989) (*Duquesne*).) In all of these cases the issue before this Court was whether a limitation upon rates charged by a regulated industry was confiscatory in the "constitutional sense." In the earlier decisions, this Court appeared to equate confiscation with a violation of the Fourteenth Amendment due process clause. (*United Railways*, *supra*, 280 U.S. at p. 252, *Natural Gas Pipeline*, *supra*, 315 U.S. at p. 586.) In more recent cases, this Court seemed to equate confiscatory rates with the Fifth Amendment takings clause. (*Florida Power Corporation*, *supra*, 480 U.S. at p. 253, *Duquesne*, *supra*, 488 U.S. at p. 308.)

Regardless of how phrased, this court held in each case that there is no Constitutional violation unless the regulated rates fall below the minimum necessary to avoid confiscatory results. (*Natural Gas Pipeline*, *supra*, 315 U.S. at p. 585, *Duquesne*, *supra*, 488 U.S. at p. 307.) In so

holding, the Court held, if not expressly then by implication, that there can be no constitutional violation if there is the ability to adjust the rates to avoid confiscatory results. Such a remedy prevents a constitutional injury from occurring in the first instance. There is a practical aspect to this holding. First, such a remedy avoids putting the reviewing court in the position of having to calculate what is the lowest rate to avoid confiscatory results. (*Duquesne, supra,* 488 U.S. at p. 314, *Natural Gas Pipeline, supra,* 315 U.S. at pp. 585-586, *Kavanau, supra,* 16 Cal.4th at p. 784, *New England Telephone and Telegraph Co. v. Department of Public Utilities,* 97 N.E.2d 509, 517 (Mass. 1951).) Second, such a remedy places the cost of compensating the injured party on the persons who benefitted from the confiscatory rate. (*Kavanau, supra,* 16 Cal.4th at p. 784.)

In *Mountain Water Company v. Montana Department of Public Service Regulation,* 919 F.2d 593, 600 (9th Cir. 1990), the Ninth Circuit, relying on this Court's decisions cited herein, held that requiring a privately owned water utility to reimburse customers for certain repair costs to individually owned lines did not violate the Constitution since the utility could obtain compensation for those costs through rate increases. A constitutional violation occurs only if the rate increase fails to compensate the utility company.

Other state courts that have had occasion to consider the issue of confiscatory prices in the rent control context have reached the same result. Massachusetts, New Jersey, and New York all hold that the remedy for confiscatory rents is to remand for a readjustment of rates to allow a just and reasonable return. (*New England Telephone and*

Telegraph Company, supra, 97 N.E.2d at pp. 515, 520, *Zussman v. Rent Control Board of Brookline,* 343 N.E.2d 889, 894-895 (Mass. 1976); *Park Tower Apartments, Inc. v. City of Bayonne,* 447 A.2d 1359, 1364-1366 (N.J. 1982), relying upon the New Jersey Supreme Court decision of *Troy Hills Village v. Township of Parsippany,* 350 A.2d 604 (N.J. 1975); *Tager v. Commissioner of the Department of Rent and Housing Maintenance,* 320 N.Y.S.2d 947, 951 (1971), *Dobson Factors, Inc. v. Temporary State Housing Rent Administrator,* 178 N.Y.S.2d 893, 894 (1957).) This remedy is proper even after lengthy delays. (*Park Tower Apartments, Inc. v. City of Bayonne, supra,* 447 A.2d at p. 1366, *Zussman v. Rent Control Board of Brookline, supra,* 343 N.E.2d at p. 895.)

The California Supreme Court's decision in this case is consistent with decisions from this Court, the Ninth Circuit, and other state courts that have considered the issue. The California Supreme Court does not hold, contrary to *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982), that landlords must exhaust administrative remedies before seeking constitutional damages. The prospective rent remedy prevents a constitutional injury from occurring.

In the most recent case from this Court involving economic regulation and due process, this Court held that a California contractor denied payments without a pre- or post-deprivation administrative hearing for failing to pay prevailing wages did not have a Section 1983 due process cause of action. *Lujan v. G & G Fire Sprinklers, Inc.,* ___ U.S. ___, 121 S. Ct. 1446 (2001). This Court observed that the contractor only had a claim to be paid in full and California afforded the contractor "sufficient opportunity

to pursue that claim in state court." Under these circumstances, this Court held that the "ordinary judicial process" available to the contractor will satisfy due process. (121 S. Ct. at pp. 1450-1451.)

Similarly here, the Gallands only had a claim to the requested rent increases. There has always been an available remedy through California's writ of mandate procedures to review rent increases to determine if they are confiscatory. (See, for example, most recently *Carson Harbor Village Ltd. v. City of Carson Mobile Home Park Rental Review Board*, 70 Cal.App.4th 281, 287 (1999).) The California Supreme Court in this case and in its earlier *Kavanau* decision reaffirmed the availability of a judicial remedy to review the adequacy of rent review determinations. The California Supreme Court also clarified that if upon judicial review it is determined that a rent increase is confiscatory, an amount of rent necessary to avoid confiscatory results shall be required.

The Gallands contend that *Lujan* has no application because it is strictly a procedural due process case and that this case involved an inadequate process invoking both procedural and substantive due process issues. In *Lujan*, the contractor was completely denied a hearing. A complete denial of a hearing can be equated with a claim of an inadequate hearing. The Gallands also contend that, unlike the contractor in *Lujan* which merely had a contract claim, they have a Constitutional right to reasonable rents. This is a distinction without a difference. In both cases, the petitioners merely have an unperfected claim to receive money. The *Lujan* contractor had not yet proven an entitlement to additional payments, and the Gallands have not yet proven an entitlement to higher rents. What

payments the contractor can recover and what rents the Gallands can collect is the issue to be decided upon judicial review.

In deciding *Lujan*, this Court did not inject uncertainty into this area of law. This Court merely recognized that in most circumstances a state's judicial process will satisfy due process requirements. The principals of *Lujan* are applicable to this case.

4. In Further Proceedings Upon Remand the Gallands Will Have an Opportunity to Prove a Violation of Substantive Due Process Arising out of the Nature of the Rent Review Hearings

The Gallands alleged in their complaint that they were deprived of both procedural and substantive due process rights because they were forced to participate in arbitrary and unreasonable administrative proceedings. (Pet. App. 20-38.) While unfair hearings are generally equated with procedural due process violations easily remedied under California's writ of mandate procedures,[6] the California Supreme Court nonetheless decided that a seriously defective rent control process could inflict a substantive due process injury. The issue before the court was what standard should be applied to determine if the actions of Clovis during the rent review proceedings violated the Gallands' substantive due process rights.

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[6] California Code of Civil Procedure, sections 1067 et seq. (West 1980), California Rules of Court, Rule 56 (West 1996). See, in particular, Sections 1085 and 1094.5 pertaining to writs of mandate.

Clovis urged the lower courts to adopt the "shock the conscience" standard utilized by this Court for finding a substantive due process violation as most recently set forth in *County of Sacramento, supra,* 523 U.S. 833, and as set forth by the New Jersey Supreme Court in *Rivkin v. Dover Township Rent Leveling Board,* 671 A.2d 567 (N.J. 1996). In *County of Sacramento, supra,* 523 U.S. at pp. 836-837, a deputy sheriff conducted a high-speed chase in violation of department policy which resulted in the death of a suspect fleeing the sheriff. The suspect's parents and the estate sued the county under Section 1983 claiming that the officer violated the suspect's substantive due process rights. This Court held that a violation of substantive due process requires a showing that the sheriff's conduct "shocked the conscience" of the Court. (523 U.S. at p. 846.) In reaching its decision this Court specifically noted:

> "While due process protection in the substantive sense limits what the government may do in both its legislative, [citations omitted], and its executive capacities, [citations omitted], criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." (523 U.S. at p. 846.)

When a specific act of a government official is at issue the standard is "shock the conscience."

> "Our cases dealing with abusive executive action had repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,' . . . . To this end, for a half a century now we have spoken of the cognizable level of executive

abuse of power as that which shocks the conscience." (523 U.S. at p. 846.)

In *Rivkin, supra,* 671 A.2d at pp. 570-571, a case similar to this one, Dover Township, New Jersey had a mobile home park rent leveling ordinance which required owners of mobile home parks to apply to the Dover Township Rent Leveling Board ("Board") for mobile home park increases. The Board was made up of one mobile home park owner, one mobile home park tenant, and three nonaffiliated public members. The Rivkins, owners of one of the mobile home parks, filed an application for a rent increase to cover the expense of capital improvements. The Board conducted four hearings on the application. The tenant-member of the Board took an active part in the proceedings and actually became an advocate for the tenants. He "continually challenged the Rivkins and their representatives both on a personal basis, referring to their attorney as a 'yo-yo,' and on a partisan basis, introducing facts from outside the record." The Rivkins requested that the tenant-member be removed from the proceedings which the Board denied. The Board awarded the Rivkins approximately one-third of the requested rent increase. The court, in determining whether any of the actions that occurred during the rent review proceedings violated the Rivkins' substantive due process rights, thoroughly examined the history behind the doctrine of substantive due process and how the substantive due process doctrine has been applied by this Court. The New Jersey Supreme Court determined that the shock the conscience standard is the appropriate standard in evaluating substantive due process claims.

The court held:

> "[S]ubstantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity.' [Citation omitted.] With the exception of certain intrusions on individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked." (671 A.2d at pp. 574-575.)

Further:

> "[T]he conduct of an errant board member who berated an applicant and brought in facts outside the record at a rent proceeding in violation of acceptable board practice does not rise to the level of a substantive due process violation under the Supreme Court's standards." (671 A.2d at p. 575.)

The California Supreme Court, after reviewing these cases and a line of other cases from the United States courts of appeals, observed that despite the variety of verbal formulations, it is clear that "the arbitrary government conduct that triggers a substantive due process violation is not ordinary government error but conduct that is in some sense outrageous or egregious – a true abuse of power. [Citations omitted.]" (Pet. App. 41-42.)[7]

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[7] The 9th Circuit Court of Appeals recently observed that "the use of substantive due process to extend Constitutional protection to economic and property rights has been largely discredited. (*Armendariz v. Penman*, 75 F.3d 1311, 1318-1319 (9th Cir. 1996).)

The court went on to formulate the appropriate substantive due process standard for determining "when an administrative body charged with implementing a law acts erroneously in such a way as to injure an individual's economic and property interests." (Pet. App. 44.) The court adopted a variant of the shock the conscience standard by looking to the D.C. Circuit Court of Appeals and held that the appropriate standard is "deliberate flouting of the law."[8] Under this standard, inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties would not amount to a violation of substantive due process. In adopting the standard, the California Supreme Court specifically held that the standard is consistent with this Court's decision in *County of Sacramento* observing that substantive due process only encompasses the most egregious official conduct when government officials abuse their power. "It cannot be said to encompass governmental mistakes and bureaucratic errors that are something less than an abuse of power." (Pet. App. 45.)

After articulating the standard, the court remanded the matter to the trial court to apply that standard to the conduct of Clovis during the rent review proceedings. (Pet. App. 53.)[9] Thus, rather than denying relief, the

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[8] *Silverman v. Barry, supra,* 845 F.2d 1072.

[9] The Gallands state on page 13 of the petition that the home owners will be forced to pay for the costs associated with the City's "bureaucratic bungling." This is not true. If upon remand the Gallands can show that the former Rent Review Commission or City Council deliberately flouted the law in any of the administrative requirements that the Gallands contend were arbitrary and burdensome, the Gallands will be entitled to recover damages from the City for that action. (Pet. App. 53.)

California Supreme Court articulated the standard to be used by the trial court in deciding whether relief is due.

To the extent that errors in rent review hearings can form a basis for recovery of damages under Section 1983, the California Supreme Court formulated the proper standard. To have a lesser standard would allow anyone dissatisfied with the outcome of an administrative hearing to bypass available state remedies and pursue a constitutional claim for damages. Under a lesser standard, procedural due process claims would routinely be recharacterized as substantive due process claims which would result in needless Section 1983 litigation. The standard formulated by the California Supreme Court is a reasonable and workable standard consistent with this Court's decision, other state courts, and with the United States courts of appeals that have had occasion to address the substantive component of the due process clause. (Pet. App. 41-42.)

CONCLUSION

There were two distinct issues before the California Supreme Court. The confiscatory rent issue and the abusive process issue. The Gallands have blurred the two issues in an attempt to create a picture that the California Supreme Court has refused to follow the dictates of *Patsy*. From that flawed premise, the Gallands ask this Court to correct what they claim are abuses by the California Supreme Court in land use and takings cases from 20

years ago.[10] This is not a land use or a takings case. This is a narrow fact setting involving specific rules for price regulation in the rent control context. The land use issues raised by the Gallands should be raised in a case where those issues are truly before this Court.

It should be emphasized that there has never been a lawful determination that the rent increases approved by Clovis were confiscatory. It may be that the Gallands were receiving a just and reasonable return.[11] This issue is to be decided by the trial court upon remand. The California Supreme Court provided substantial guidance for the trial court on how to make that determination so that the trial court's decision is not again "fundamentally flawed." In establishing those guidelines, the California Supreme Court has decided what the State's substantive law is and this Court should honor that determination. Upon remand, the trial court will also decide whether asserted abuses that occurred during the rent review hearings were of such significance as to constitute a violation of substantive due process in accordance with the standard articulated by the California Supreme Court

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[10] The Gallands reference that 11 of the 22 land use cases decided by this Court since 1978 arose in California. Assuming that the Gallands' statistics are correct, the Gallands neglect to mention that of those 22, only two (*Pennell v. City of San Jose*, 485 U.S. 1 (1988) and *Yee, supra*, 530 U.S. 519, involved rent control and this Court affirmed the decisions in both of those cases.

[11] The trial court found that the Gallands were Constitutionally entitled to a 20-25 % return. (Pet. App. 30.) The California Supreme Court questioned whether such a high rate of return is the minimum required to avoid confiscatory results. (Pet. App. 30.)

based upon decisions of this Court. Rather than denying the Gallands relief, the California Supreme Court has afforded the Gallands an opportunity for substantial relief.

Clovis respectfully prays this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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5.13.14 Rent review hearing.

(a) Upon receipt of a timely and completed petition for rent review, along with the completed concurrent response, the City Manager shall refer the petition for a hearing.

(b) A hearing officer shall be appointed in the following manner:

The City Manager shall develop a list of at least three (3) nominees, and the home owners or park owners may submit a list of additional nominees to the City Manager. All nominees shall:

(1) Be licensed attorneys by the State Bar of California in good standing;

(2) Have professional experience as hearing officers or arbitrators with particular expertise in rental dispute mediation or with experience or training showing the capabilities to deal with the issues found in the rental dispute. Preferably, the hearing officer will have had at least two (2) hearings or arbitrations concerning rent disputes between mobile home park owners and mobile home owners;

(3) Not own an interest in a mobile home park, not be a home owner in a mobile home park, not be an employee, officer, member or otherwise affiliated with any group or organization which has or is viewed by a significant number of park owners or home owners as having taken advocacy positions in rent control matters.

The list of nominees shall include the resumes of each detailing their qualifications. The City Manager shall periodically review its list of nominees, and with

respect to nominees submitted by the home owners or park owners, the City Manager shall review the list and conduct such investigation and/or interviews as he or she deems necessary. The City Manager shall consult with both parties in an attempt to select a hearing officer acceptable to both. In the event of disagreement by either or both of the parties, the City Managers selection shall be final.

(c) The hearing officer shall be selected within thirty (30) days of receipt of the park owner's cash deposit. An extension may be granted upon stipulation of the parties, or for good cause as determined by the City Manager. The maximum period of extension shall be fifteen (15) days.

(d) The hearing officer shall conduct a hearing with the parties, and/or their designated representatives, within thirty (30) days of the date the hearing officer was selected. Prior to conducting the hearing, the hearing officer shall review the notice of rent increase and the petition and concurrent response. The hearing officer shall define the issues to be decided at the hearing and shall notify the parties in advance of the issues. Prior to conducting the hearing, the hearing officer may choose to meet only with the designated representatives of one of the parties at a time.

(e) The hearing shall be informally conducted, and the technical rules of evidence shall not apply, except that irrelevant and unduly repetitious evidence shall be excluded. All evidence shall be received only on oath or affirmation. Each party shall have the right to (1) call and examine witnesses on any matter relevant to the issues of

the hearing; (2) introduce documentary and physical evidence; (3) cross-examine opposing witnesses on any matter relevant to the issues of the hearing; (4) impeach any witness regardless of which party first called the witness to testify; (5) rebut the evidence; and (6) to be represented by anyone who is lawfully permitted to do so. The hearing officer shall direct the order of the proceedings.

(f) The burden of proving the reasonableness of the proposed rent increase shall be on the park owner. The burden of proving a reduction in services, which are not acknowledged by the park owner, shall be on the affected mobile home owners alleging that a reduction in services has occurred.

(g) During the hearing process, the concerns of each party shall be discussed and the hearing officer shall indicate the amount and nature of any further information he or she will need from any party in order to reach a determination. All information submitted shall be in writing and shall be certified in the same manner as set forth in Section 5.13.08. Copies of any information submitted to the hearing officer shall be provided to the other party. Each party shall comply with the hearing officer's request for information within ten (10) working days of the request. For good cause, a reasonable extension of time to comply with the hearing officer's request may be granted by the hearing officer in up to ten (10) day increments, for a maximum extension of twenty (20) days. The hearing officer may proceed under this part regardless of whether any party defaults in providing any of the requested information.

(h) The hearing officer may take official notice, either during the hearing, or after submission of the matter for decision, of any fact which may be judicially noticed by the courts of this state or of official records, regulations, rules, and decisions of state and local agencies, boards and departments, and of city and county ordinances. In addition, the hearing officer may take official notice of matters in its own files and of prior proceedings under this chapter involving the same issues. If applicable, the hearing officer may also take official notice of any generally accepted technical or scientific matter within the hearing officer's expertise. The parties present at the hearing shall be informed of the matters to be noticed, and those matters should be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority.

(i) The hearing officer may issue a subpoena for the attendance of witnesses or the production of other evidence at a hearing upon the hearing officer's own initiative, or upon the written demand of any party. The issuance of such subpoena shall be obtained upon the filing of an affidavit therefor which: (1) states the name and address of the proposed witness; (2) specifies the exact things sought to be produced and the materiality thereof in detail to the issues involved; and (3) states that the witness has the desired things in his or her possession or under his or her control. A subpoena need not be issued when the affidavit is defective in any particular. Any person who refuses without lawful excuse to attend any hearing, or to produce material evidence which the

person possesses or controls as required by any subpoena served upon such person as provided for herein shall be guilty of a misdemeanor.

(j) A record of the entire proceedings shall be made by tape recording or by any other means of permanent recording determined to be appropriate by the hearing officer. The proceedings at the hearing shall also be reported by a stenographic reporter if requested by any party thereto. A transcript of the proceedings shall be made available to all parties upon request and upon payment of the fee prescribed therefor. Such fees may be established by the hearing officer, but shall in no event be greater than the costs involved.

(k) If, during the hearing process, the parties agree to a specific rental increase or to a settlement of the dispute in question, the hearing officer shall prepare a memorandum of agreement so specifying the amount of such increase and/or the terms of settlement. The memorandum of agreement shall be executed by the owner and the home owners of their designated representative(s). The memorandum of agreement shall be final and binding upon the parties and shall not be subject to rent review or further appeal under this chapter. (§ 1, Ord. 92-23, eff. December 1, 1993)

5.13.15 Hearing: Determination: Effective date of rent increase.

If a memorandum of agreement is not executed by the parties in accordance with Section 5.13.14(k) the hearing officer shall render his or her decision. In the case of a rent increase dispute, the hearing officer shall determine

the amount of allowable rental increase, if any, in accordance with the standards of Section 5.13.05, if applicable, and Section 5.13.17, and the increase, if any, shall be effective the date the hearing officer's decision becomes final, or one hundred ninety-five business days after the notice of the rent increase is given, whichever is sooner. (§ 1, Ord. 92-23, eff. December 1, 1993)

5.13.16 Hearing: Determination final: Conditions: Costs: Judicial review.

(a) The determination of the hearing officer shall be final, and shall be delivered to the City Manager and the parties in writing, together with written findings of fact supporting such determination within fifteen (15) working days of the close of the hearing. The date the hearing officer issues his or her decision shall be deemed the date the decision becomes final for purposes of seeking judicial review.

(b) The hearing officer's determination may be reasonably conditioned in any manner necessary to effectuate the purposes of this chapter.

(c) If the hearing officer finds that the proposed rent increase above that which is exempt from review was frivolous and totally lacking in merit, the hearing officer may in its discretion require the park owner to pay to petitioners all or part of petitioners' costs of the hearing. If the hearing officer finds that the petition was frivolous and totally lacking in merit, the hearing officer may in its discretion require the petitioners to pay to the park owner all or part of the park owner's costs of the hearing. For purposes of this subsection "costs of the hearing"

means those costs recoverable in a court action pursuant to California Code of Civil Procedure Section 1033.5, and shall also include the costs of the hearing officer, but shall not include the costs for professional services incurred by a park owner or home owner.

(d) Any proceeding to obtain judicial review shall be filed within ninety (90) days after the decision of the hearing officer becomes final. (§ 1, Ord. 92-23, eff. December 1, 1993)

Supreme Court, U.S.
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No. 00-1903

In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of California

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 203,000 builder and associate members throughout the United States, including more than 5,700 members in the state of California. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution and federal statutes, particularly when such remedies are in any way obstructed by a state court.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S.

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. ---, 121 S.Ct. 2448 (2001).

SUMMARY OF ARGUMENT

The California Supreme Court has erroneously held, contrary to the clear decisions of this Court and the acknowledgment of numerous state courts, that state remedies must be exhausted before someone can bring a claim under 42 U.S.C. § 1983.

In addition, the California court has unsoundly determined that current and prospective tenants must bear the entire burden to make whole a property owner who suffers economic injury due to both unjustifiably low rent control limits and violations of the property owner's procedural and substantive due process rights.

REASONS FOR GRANTING THE WRIT

I. NO STATE COURT MAY PLACE PROCEDURAL, ADMINISTRATIVE OR LEGAL ROADBLOCKS REQUIRING EXHAUSTION OF ANY ALLEGEDLY AVAILABLE REMEDIES IN THE WAY OF A CLAIM BROUGHT UNDER 42 U.S.C. § 1983.

Almost two decades ago this Court, after considering a host of judicial precedent and legislative intent going back to 1871, determined that no state could impose any type of exhaustion requirement upon a party claiming a violation of federal constitutional rights under 42 U.S.C. § 1983.

> I fully agree with the Court that our frequent and unequivocal statements on exhaustion cannot be explained or distinguished away as the Fifth Circuit attempted to do. For nearly 20 years and on at least 10 occasions, this Court has clearly held that no exhaustion of administrative remedies is required in a § 1983 suit.

Patsy v. Board of Regents, 457 U.S. 496, 517 (1982)(White, J., concurring).

Indeed, even members of the Court with some sympathy for the lower court's decision reached the same inescapable conclusion. "[While] considerations of sound policy suggest that a § 1983 plaintiff should be required to exhaust adequate state administrative remedies before filing his complaint. . . : this Court already has ruled that, in the absence of additional congressional legislation, exhaustion of administrative remedies is not required in § 1983 actions." *Id.* (O'Connor and Rehnquist, JJ., concurring).

In rejecting a notice of claim requirement imposed by Wisconsin six years after the *Patsy* decision, this Court further noted that even a procedure that "does not involve lengthy or expensive administrative proceedings [yet] forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place" was insupportable. *Felder v. Casey*, 487 U.S. 131, 147 (1988). "[T]he notion that a State could require civil rights victims to seek compensation from offending state officials before they could assert a federal action in state court" is "utterly inconsistent with the remedial purposes of [§ 1983]." *Id.*

The Wisconsin Supreme Court unanimously accepted this Court's decision as the definitive statement of law regarding exhaustion requirements and § 1983. "The [U.S. Supreme Court's *Felder* opinion] very strongly, convincingly, and clearly asserts that a state court may not impose an exhaustion requirement in a sec. 1983 action." *Casteel v. Vaade*, 481 N.W.2d 476, 480 (Wis. 1992).

The Wisconsin Supreme Court was joined by a host of other state courts in recognizing the unequivocal statement of this court that no exhaustion requirement of any kind may be applied to a § 1983 claim.[2]

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[2] *See, e.g., Diedrich v. City of Ketchikian*, 805 P.2d 362 (Alaska 1991); *Zeigler v. Kirschner*, 781 P.2d 54 (Ariz.Ct.App.1989); *Arkansas State Medical Bd. v. Leipzig*, 770 S.W.2d 661 (Ark. 1989); *Patel v. Thomas*, 793 P.2d 632 (Colo. Ct. App.1990); *Miller v. District of Columbia*, 587 A.2d 213 (D.C. 1991); *Howlett v. Rose*, 571 So.2d 29 (Fla. Dist. Ct. App. 1990); *Allen v. Bergman*, 400 S.E.2d 347 (Ga. Ct. App. 1990); *Brumage v. Woodsmall*, 444 N.W.2d 68 (Iowa 1989); *Prager v. State Dept. of Revenue*, 20 P.3d 39 (Kan. 2001); *McGehee v. DePoyster*, 708 So.2d 77 (Miss. 1998); *Blackwell v. City of St. Louis*, 778 S.W.2d 711 (Mo. Ct. App.1989), *cert. denied*, 494 U.S. 1067 (1990); *Gibney v. Toledo Board of Education*, 532 N.E.2d 1300 (Ohio 1988).

Yet despite this sea of precedents, the California Supreme Court ordered the Gallands to return to the administrative process crafted by the Clovis bureaucracy, before any § 1983 claim could be raised.

That this decision is legally insupportable is clear. What makes it even more egregious is that the California Court *recognized* that the City of Clovis led the Gallands into a rent control "Twilight Zone:"

> Neither the [City's rent control] Ordinance nor any implementing regulations made clear precisely how the Gallands were to obtain a rent increase. This regulatory vacuum was filled by an ad hoc proceeding marked by Clovis's shifting, costly, and at times ill-considered requests for information. As a result, the Gallands lacked a timely and affordable means by which to seek rent increases.

Galland v. City of Clovis, 24 Cal.4th 1003, 1037 (2001).

Not all members of the California Court failed to grasp this Court's clear statements of law on exhaustion of state remedies, or the unequivocal existence of a due process violation in the present case. "We now intervene to eviscerate a federal civil rights remedy whose very purpose is to provide an alternative to abusive or corrupt state adjudicative procedures like those the Gallands had to endure. . . ." *Id.* at 1046 (Brown, J., dissenting).

While erecting state administrative barriers to § 1983 has the potential to impact all citizens, Justice Brown's dissent noted another sinister aspect to this decision. "The real mischief of the majority's opinion lies in its disparate treatment of property rights when enforcing Section 1983.

. . . The Constitution bespeaks no hierarchy of rights, no preferences with respect to its constraints on government action, no partiality among its protections of liberty." *Id.* at 1056 (Brown, J., dissenting).

This Court must set the legal record straight. It should grant certiorari to reaffirm that no administrative hurdles must be overcome before a § 1983 claim may be heard. For while property rights may have been the victim here, all constitutional rights that may be vindicated through § 1983 are now at risk.

II. THE CALIFORNIA SUPREME COURT'S REMEDY MISTAKENLY REQUIRES PRESENT AND FUTURE TENANTS TO PAY FOR THE GOVERNMENT'S UNCONSTITUTIONAL ACTIONS.

NAHB has played an integral role in increasing affordable housing for low-income people since its inception. Many of its members, both nationally and in California, construct multifamily buildings, including government-subsidized housing. Therefore, as NAHB works to ensure an affordable housing market exists for buyers, it works to ensure an affordable rental market exists for those who lease their homes.

The California Supreme Court has erroneously set up a procedure that fails to exact compensation from the offending party. *Cf. National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988) (Explaining that in a § 1983 action "liability attaches only to those wrongdoers 'who carry a [state] badge of authority . . .'") (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). By granting certiorari in this matter, this Court could remove a financial burden that the court below placed on a segment of society that can not afford it. The

California majority provides that after the superior court has decided that the government's denial of a rent increase is confiscatory, then the government should allow an increase in future rents to compensate for the unconstitutional confiscatory rents and administrative costs that have been borne by a landlord. *Galland*, 24 Cal.4th at 1023-24, 1028.

The remedy, however, lays all the costs of the government's unconstitutional and wasteful activities on present and future tenants. The California majority's reasoning is that increasing future rent places the burden of compensating the landlord on those who have most benefited from the confiscatory rents. *Galland*, 24 Cal.4th at 1029, n. 5. The court, however, failed to fully analyze the effects of its remedy.

The California Supreme Court refers to its remedy as a "*Kavanau* adjustment." *Galland*, 24 Cal.4th at 1008. In *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761 (1997), the court held that a landlord can not maintain an action for a 5th Amendment Taking when the government illegally denies rent increases for a number of years. Instead, a landlord must, after obtaining a court decision declaring the denials unlawful, request an increase in future rents to offset its historical losses.

The *Kavanau* court cited *California v. Levi Strauss & Co.*, 41 Cal.3d 460 (1986) and *Blue Chip Stamps v. The Superior Court of Los Angeles County*, 18 Cal.3d 381 (1976) to support its reasoning for placing the financial burden on the present and future tenants. *Kavanau*, 16 Cal.4th at 784. In both of those class action cases, the courts discussed the concept of "fluid recovery."[3] In *Galland*, the California Supreme Court inverted and muddled the concept of fluid recovery in formulating its remedy.[4] In doing so, it ignored two purposes of fluid recovery: to remove illegal earnings from a wrongdoer and to deter future unlawful conduct. *Levi Straus*, 41 Cal.3d at 472; *Simer v. Rios*, 661 F.2d 655, 676-7 (7th Cir. 1981), *cert. denied* 456 U.S. 917 (1982).

First, the remedy chosen by the California Supreme Court requires present and future rent controlled tenants to pay compensation. These tenants are not wrongdoers, and they should not incur any financial burden due to the government's unconstitutional activities. Second, by placing the entire financial burden on present and future tenants the California Supreme Court's remedy allows the government to continue imposing confiscatory rents, in an unfair manner, knowing that its actions will not result in any retribution. *Galland*, 24 Cal.4th at 1028 ("If the trial court reaffirms that the rent ceilings were confiscatory . . ., then the matter would generally be remanded to the

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[3] Under a "fluid recovery," a class action defendant pays its total liability into a fluid recovery fund. Subsequently, class members may collect their shares by proving their claims. Afterward, the remainder of the fund is distributed in some fashion approved by the court. One method of ensuring that the remainder does not revert to the wrong doer is to decrease the defendant's future prices to make up for illegally high past prices. This type of remedy is appropriate, for example, when an entity, such as a public utility, has charged illegally high rates.

[4] It did so because in *Galland*, there was not a party that overcharge consumers, but a party who was not allowed to charge enough.

[municipality] to attempt a Kavanua adjustment.") Thus, the remedy does not deter future unlawful conduct by the government. *Id.* at 1050 (Brown, J., dissenting).

Furthermore, the California majority's remedy for dealing with a municipality's due process violation is irrational. It has clearly lost sight of those citizens burdened by its own remedy. A government establishes rent control protections to ensure the availability of affordable housing. *See generally*, Elizabeth Naughton, *San Francisco Owner's Move-In Legislation: Rent Control or Out of Control*, 34 U.S.F.L.Rev. 537, 542 546 (2000)("Providing affordable housing to vulnerable members of the community" is a policy goal of rent control.); Ray Telles, *Forgotten Voices: Gentrification and Its Victims*, 3 Scholar: St. Mary's L.Rev. Minority Issues 115, 145 (2000)(Explaining that by maintaining reasonable rental prices, the reduction of affordable housing is slowed.); *Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988)("Indeed, a primary purpose of rent control is the protection of tenants."). Thus, rent control should benefit low-income families.

Low-income households in California continuously face housing pressures. California's Department of Housing & Community Developments provides:

> Given the increase in lower-income households in the State and ongoing declines in lower priced rentals, there are strong price pressures on lower priced urban rentals. . . . It is evident that renter cost burdens pose a significant problem. Statewide, more than two million households - nearly half of all renters - paid more than 30 percent of their income to housing. For poor renters, the problem is still more grim; in 1995 three

> quarters of low-income and 86 percent of very low income households in key metropolitan areas were paying more than 30 percent of their income to housing – 63 percent of low-income and nearly 80 percent of very low-income households were spending in excess of 50 percent of their income for housing.

Department of Housing & Community Development, *California's Housing Markets 1990-1997, Statewide Housing Plan Update Phase II*, at 1 (1988). These are the households on which the California Supreme Court has placed an additional financial burden by instituting a remedy that increases future rents.

Similarly, the California Supreme Court's analysis (that present and future tenants have likely benefited from the confiscatory rents) does not account for all rent-controlled tenants. It only addresses mobile home tenants. The court began its opinion by establishing that mobile home renters are "unlike the usual tenant," because they rent space for mobile homes that, once in place, are generally never moved. *Galland*, 24 Cal.4th at 1009-10. Thus, those who lease mobile home space may rent for longer periods than average residential tenants. Therefore, it is more likely they benefited from the low rents that the government imposed. However, the California majority fails to mention the turnover rates for the "usual" tenant and does not discuss how its remedy will affect the usual rent controlled tenants as a group.

If the usual rent controlled tenant does not remain in place for long periods, then the usual tenant may not have been present to benefit from the confiscatorily low rents. Increased future rents would therefore force this tenant to pay for benefits it did not receive. Hence, the California

Supreme Court has irresponsibly established a remedy based on reasoning that may only be applicable to a small subgroup of rent-controlled tenants in California.

Finally, the California majority failed to perform one of its key functions, to protect a vulnerable segment of our society. In *The Federalist No. 78*, Alexander Hamilton, while describing the importance of the judiciary to "guard the Constitution," explained that the judiciary must remain independent from the executive and legislature, and must not accept "oppressions of the minority party in the community." *The Federalist No. 78*, at 404 (Alexander Hamilton)(George W. Carey & James McClellan eds., 1990). The California Supreme Court has established a rule that does not require the government to provide any monetary compensation by allowing it to pass costs due to its own unconstitutional conduct to a minority group of its citizens (present and future rent controlled tenants).[5] This is the exact type of majority oppression that Hamilton warned against. Moreover, it is even worse because the California judiciary developed this oppressive remedy as opposed to the executive or legislature. By granting certiorari, this Court can ensure that a minority segment of society is not forced to pay the costs of the government's unconstitutional actions and "inefficient," "ill considered" procedures. *Galland*, 24 Cal.4th at 1037.

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[5] The majority population would generally support such a rule as it allows the government to retain public resources. Consequently, those officials who imposed unconstitutional confiscatory rents are not at risk when the majority once again chooses its representatives.

CONCLUSION

For these reasons, the National Association of Home Builders urge this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the California Supreme Court's *Galland* decision .

DATED: July 20, 2001

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(4)

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In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF, AMICUS CURIAE, OF ACTION APARTMENT ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Must a rental property owner prove that the governmental agency "deliberately flouts the law" to recover damages under 42 U.S.C. § 1983, even if the owner proves that the governmental agency unreasonably delayed an administrative hearing to obtain constitutionally mandated rent increases?

Is the California Supreme Court's standard of "deliberately flouting the law" too burdensome a standard to impose on the property owner's right to recover damages under 42 U.S.C. § 1983, when the owner has proven to the trial court that the administrative agency has unreasonably delayed in granting constitutionally mandated rent increases?

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BRIEF, AMICUS CURIAE, OF ACTION APARTMENT ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of This Court, amicus curiae, ACTION Apartment Association, Inc. (hereinafter ACTION) submits this brief in support of the Petition for Writ of Certiorari.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

ACTION was originally formed as an unincorporated association in 1979 and has been a nonprofit corporation, organized under the laws of the State of California since 1984. ACTION is an acronym for "A Commitment To Insure Owner's Needs" and it currently represents the interests of approximately 3,200 Santa Monica rental property owners, who are mainly owners of Santa Monica apartment buildings.

ACTION members have been subject to the Santa Monica Rent Control Law since April 10, 1979 and have collectively filed hundreds of individual rent increase petitions between 1979 and 1998 when that process became too onerous. As a result of this collective experience, ACTION members found that the rent increase

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[1] The parties have consented to the filing of this brief.

No counsel for any party authored this amicus brief in whole or in part, and no entity or person, other than amicus curiae herein (Action), its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

process in Santa Monica became so burdensome and time consuming that they consider it to be a useless act. As a result, few rent increase petitions are filed today. ACTION members know that although rent control boards should inevitably become more efficient after processing hundreds of rent increase petitions, the opposite is true insofar as the Santa Monica Rent Control Board is concerned.

During the first ten years that the Rent Control Law was in effect, the Santa Monica Rent Control Board usually complied with the 120-day time limitation found at Santa Monica Rent Control Law Section 1805(d)(12) by rendering timely decisions that took no more than two or three days of hearings. But once the Board discovered that the 120-day time limitation is meaningless because there is no remedy when the Board renders untimely decisions, it increased the procedural burdens in rent increase hearings to a point where few owners could complete the process without expensive professional assistance. Whenever its burdensome rent increase process or untimely decisions are challenged, the Rent Control Board most often responds with a citation to the California Supreme Court case of *Edwards v. Steele*, 25 Cal.3d 406, 158 Cal.Rptr. 662 (1979), which holds that time limitations placed upon administrative agencies are "directory procedural requirements" rather than "mandatory" or "jurisdictional." Thus, the Board retains jurisdiction to adjust rent levels no matter how long it takes to do so. The result of this situation is foreseeable for an agency that exists solely for the purpose of keeping rent levels as low as possible for as long as possible; the burdensome procedural requirements were increased to a point where

most rental property owners gave up filing rent increase petitions.

Court of Appeal published its Opinion in the case of *Galland v. City of Clovis* on June 9, 1999. ACTION members hoped that the decision would cause the Santa Monica Rent Control Board to become more efficient and reasonable when applying its rent increase process. But unfortunately, the California Supreme Court overruled the Court of Appeal's decision in *Galland v. City of Clovis*, 24 Cal.4th 1003, 103 Cal.Rptr. 71 (2001) and it did so in a manner which virtually assures that rental property owners subject to California rent control laws will continue to have no enforceable right to reasonable and expeditious rent adjustment procedures. This is a result of the California Supreme Court requiring that a 42 U.S.C. § 1983 claim can only be granted if the rental property owners prove: (1) the costs imposed are part of a government effort to deliberately flout established law, e.g., deliberately obstruct legitimate rent increases; or (2) the landlord suffers confiscation as a result of the imposition of such costs. See *Galland, supra,* 24 Cal.4th at 1037.

In the *Galland* decision, the California Supreme Court imposed a remedy for burdensome and expensive administrative procedures that required rental property owners to endure more of the same by going through more hearings to prove that the agency was "deliberately flouting" the law or that the result was "confiscatory," which was the entire point of going through the rent increase process the first time. In other words, in the *Galland* decision, the remedy is similar to the injury. The Decision also requires that before a rent control agency has to pay compensation for the injury it caused, the property owner

must first attempt to recover damages from the tenants in the form of higher rent increases.

For the reasons stated in this Brief, ACTION contends that the requirements imposed by the California Supreme Court in this case are not in accordance with requirements of federal law and must be reversed to end the violation of their rights.

THE CALIFORNIA SUPREME COURT'S RESTRICTION OF DUE PROCESS RECOVERY UNDER 42 U.S.C. § 1983 TO CASES WHERE PROPERTY OWNERS PROVE THAT THE GOVERNMENT "DELIBERATELY FLOUTS THE LAW" IS IN CONFLICT WITH THE GOVERNMENT'S CONSTITUTIONAL DUTY TO END CONFISCATORY PRICES WITHOUT UNREASONABLE DELAY.

Modern rent control laws were first applied in California during the 1970's, which was a time of high monetary inflation. The first law reviewed by the California Supreme Court was the Berkeley Rent Stabilization Ordinance which was first adopted in 1972. Although operating expenses and property taxes were increasing greatly at that time, the Berkeley rent control law froze all rent levels and did not permit any rent increases unless and until each individual property owner in that City petitioned the Rent Stabilization Commission for an individual rent increase. The California Supreme Court rejected this approach in *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 130 Cal.Rptr. 465 (1976):

> "For such rent ceilings of infinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the previously mentioned situations in which the base rent cannot reasonably be deemed to reflect general market conditions. ***The mechanism is constitutionally necessary for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary. 'Property may be as effectively taken by long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them. . . . '*** (*Smith v. Illinois Bell Tel. Co.*, (1926) 270 U.S. 587, 591, 70 L.Ed. 747, 749, 46 S.Ct. 408)" (Emphasis added) *Birkenfeld*, 17 C.3d 169.

The California Supreme Court struck down the first Berkeley rent control law because it found that rent levels could not be adjusted without unreasonable delay by using an individual rent adjustment process alone. However, in 1983, the California Supreme Court again reviewed increase procedures in *Carson Mobilehome Owners v. City of Carson*, 39 Cal.3d 194, 197 Cal.Rptr. 284 at 289 (1983) further defined the terms "long continued and unreasonable delay:"

> "The procedures of the Carson scheme are carefully tailored to meet the legitimate interests of the ordinance without a substantially greater incidence and degree of delay than is practically necessary." (See *Birkenfeld, supra*, ...) Under the ordinance, the Board has a maximum of 105 days to act on an application. If the Board has

> not acted within that time, the ordinance provides that an interim increase should be granted. *These provisions insure that a landlord will not suffer impermissibly confiscatory rents longer than is necessary for a relatively prompt determination of his or her application.*" (Emphasis added.) *Carson, supra,* 39 Cal.3d 193, 197 Cal.Rptr. 289.

Carson, supra, was a mixed blessing for mobilehome park owners in small California communities such as Clovis. On one hand, rent control agencies were required to render prompt decisions, while on the other hand, general rent adjustments were found to be unnecessary for those small communities. Therefore, the cost of participating repeatedly at rent adjustment procedures became a recurring business expense, which explains why the Gallands were subject to repeated rent increase proceedings in 1983, 1985, 1988, 1989 and 1990; there was no annual general rent adjustment.

In 1984, the Supreme Court again reviewed the Berkeley rent adjustment procedures in *Fisher v. City of Berkeley,* 37 Cal.3d 644, 209 Cal.Rptr. 682 (1984) where the Court approved a 120-day time limit, but seemed to express concern about any greater delays:

> " . . . We stress that only the facial validity of the ordinance is currently before the court. Whether individual landlords might prove a denial of due process because of delays exceeding the 120 day time limit is of great concern, but it is not before us at this time." (*Fisher, supra,* 37 Cal.3d, 682, Fn. 52.)

Despite the repeated references made for timely rent adjustment decisions by the California Supreme Court,

the Decision under review establishes that the matter is actually of little concern to the majority of that Court. The dissenting opinion of California Associate Supreme Court Justice Brown accurately sums up the majority's failure to address the constitutional requirements it first set forth in *Birkenfeld, supra.*

> "It is long settled that a rent control scheme is confiscatory and violates due process if it is not 'capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.' (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 169 (*Birkenfeld*).) The majority rejects this standard, noting that *Birkenfeld* involved a facial challenge to a rent control scheme, whereas the Gallands are seeking 'damages resulting from . . . the rent-setting process itself.' (Maj. opn., ante, at p. 46.) But if a rent control scheme is unconstitutional on its face for failing to provide a streamlined rent adjustment procedure, then it is all the more unconstitutional when a concrete factual record establishes the scheme's inefficiency and inadequacy in practice. Surely, if Clovis had adopted regulations outlining all the convolutions of the rent adjustment procedure it imposed on the Gallands, including the unexplained delays and shifting demands for information, then those regulations would have been facially unconstitutional under *Birkenfeld*. The fact that Clovis kept its arcane procedures secret, even seeming to make them up as it went along, certainly does not militate a different conclusion in Clovis's favor." (*Galland, supra,* 23 Cal.4th 1043.

For the reasons so aptly stated by California Associate Supreme Court Justice Brown, although the California Supreme Court correctly states the Constitutional requirements during review of rent control provisions for facial validity, it actually does nothing to enforce those requirements when confronted with an "as applied" challenge when an agency has actually injured a rental property owner. Instead, that Court adopted a new standard where unreasonable delay, gross negligence and/or complete disregard for the property owners' right to a prompt decision are ignored or are deemed to be insufficient to establish a violation of their rights under Federal law.

For the reasons stated, ACTION respectfully urges this Court to grant certiorari and correct the unreasonable and inconsistent standards applied by the California Supreme Court in the *Galland* decision.

THE ONEROUS REQUIREMENTS IMPOSED BY THE CITY OF CLOVIS VIOLATED THE PROPERTY OWNERS' RIGHT TO A PROMPT DECISION AND WERE NOT MERELY THE RESULT OF "BUREAUCRATIC BUNGLING."

In the *Galland* case, the California Court of Appeal found that the standard for supporting a substantive due process violation is to prove that the government action is, "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or welfare." That Court found that, as applied, the process was so burdensome that it bore no reasonable relation to the proper legislative purpose of eliminating excessive

rents and deprived the Gallands of a "fair return" on their property. However, the California Supreme Court disagreed and found that the years of onerous administrative procedures imposed upon the Gallands were not enough to establish a due process violation because the trial court did not require that the Gallands prove "deliberate flouting" of their rights and that the City's action was described as the result "bureaucratic bungling."

ACTION contends that the label of "bureaucratic bungling" is an incorrect description of the facts in the *Galland* case. That term might provide an excuse for slow agency decisions when a law first goes into effect, but the degree of "bungling" cannot logically increase as the agency gains expertise in applying the law over the years. A review of the *Galland* decision itself establishes that the delays were not the result of "bureaucratic bungling" but a complete disregard of the property owner's right to a prompt decision that got worse over time.

As noted in the California Supreme Court decision under review, the Clovis Rent Stabilization Ordinance was first adopted in 1978 and that the Gallands sought judicial review of rent increase procedures in 1983 and 1985. *Galland, supra,* 24 Cal.4th 1010-1011. Therefore, by the time the Gallands filed their rent increase petitions in 1988, 1989 and 1990 the Ordinance had been in effect for 10 to 12 years and had been defended in court on at least two occasions.

Under these circumstances, the City could not possibly have been unaware of the California Supreme Court Decisions in *Birkenfeld, Carson* and *Fisher, supra,* which were rendered in 1984 or earlier. However, the City's

response to the Gallands' rent increase proceedings was to conduct itself as though the Commission had never conducted a rent increase process before and as though it had all the time in the world to impose unreasonable requirements upon the Gallands.

The rent increase petition which was first heard by the Rent Review Commission on April 13, 1988 (i.e.,"the 1988 rent increase") did not result in a final decision until March 3, 1989. The Gallands ordered the administrative record on March 29, 1989 to seek review of that decision. (24 Cal.4th 1011-1014). Then the process slowed down much more.

The "1989 rent increase" was first scheduled for hearing on September 29, 1989 but no final decision was issued by the Clovis City Council until May 1992, which is a period of more than two and one-half years. (24 Cal.4th 1014-1015). Finally, a third rent increase hearing ("the 1990 rent increase") was first scheduled for hearing on May 18, 1990, but it was not decided until the May 1992 council meeting, along with the 1989 increase request. (24 Cal.4th 1016-1018).

The process might had taken longer to complete, however in May 1990 (while the three administrative proceedings were before the agency), the Gallands sought judicial relief. The trial court ordered that final written decisions be issued in all proceedings by October 1, 1991 and that the administrative record be lodged with the court by November 1, 1991. Again, the City was not impressed. As explained by the California Supreme Court, "Due to delays on Clovis's part, however, final commission decisions were not issued until June 1, 1992,

and the administrative record was not lodged with the trial court until June 30, 1993." *Galland, supra,* 24 Cal.4th 1016-1018. Therefore, there was a period of four years from the date the first hearing was scheduled to the date the administrative records were lodged with the trial court.

During the years of administrative proceedings before the commission, the Gallands were not only required to produce their financial data for the park at issue in the rent increase process, but also were required to provide 10 years of financial data for other parks, bring expert witnesses to the hearing to establish a "fair return" rent adjustment process and a "fair rate of return." These unreasonable burdens are far beyond the capability of most rental property owners and it is nothing short of amazing that the Gallands complied with demands which were politely described by the California Supreme Court majority as, "inefficient" "bungling","shifting," "costly," "ad hoc", "ill considered" and "unjustified." (24 Cal.4th 1036-1037). Yet the California Supreme Court was not convinced that these actions rose to the level that required the City to pay damages for the injury caused to the property owners. The California Supreme Court decision indicates that the property owners must submit to additional hearings and attempt to prove: (1) the costs imposed are part of a government effort to deliberately flout established law, e.g., deliberately obstruct legitimate rent increases; or (2) the landlord suffers confiscation as a result of the imposition of such costs. *Galland, supra,* 24 Cal.4th 1003 at 1037. Apparently the property owners are required to prove "confiscation" a second time at these additional hearings even

though they already were required to prove that they were entitled to a "fair return" at the first hearings which began approximately twelve years ago. To add to the degree of difficulty, the California Supreme Court consistently refuses to define when "confiscation" occurs or how property owners can prove that it has occurred. It appears to mean that the property owners must be driven out of business so that a "Kavanau adjustment" cannot possibly do them any good before the City is required to pay them for their injuries:

> "It is conceivable there might be a case when it is clear that resort to a Kavanau adjustment will not prevent a constitutional injury from occurring. For example, there may be an instance when, despite a landlord's reasonable efforts, confiscatory rent regulations sustained over a long period of time have caused the enterprise to fail. Under such circumstances, a section 1983 damages remedy may well be available. But nothing of that sort is evident in the record of the present case." (*Galland*, 24 Cal.4th, 1029-1030).

ACTION contends that since the California Supreme Court majority sees no confiscatory result or section 1983 violation in the *Galland* case, it is doubtful that there will ever be a case where it finds a confiscatory result or violation of law under any circumstances.

Therefore, ACTION respectfully urges this Court to grant certiorari to determine whether or not the onerous procedural requirements imposed by the City of Clovis

were in violation of the property owners' rights or merely the result of harmless "bureaucratic bungling."

CONCLUSION

ACTION believes that this Court must review the important issues raised by this case because a failure to do so sends another strong message to California rent control agencies that there are no consequences for depriving property owners of their rights and because the California Supreme Court is unlikely to ever review a case where it finds that rent control regulations go so far to constitute a taking of private property, a denial of due process, or a violation of Federal Law and order compensation for the injury suffered.

Respectfully submitted,

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On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF, *AMICUS CURIAE*, OF AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

SHOULD THE STATE COURT OF CALIFORNIA BE PERMITTED TO STAND BETWEEN A SMALL PROPERTY OWNER AND A 42 U.S.C. SEC. 1983 ACTION?

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BRIEF, *AMICUS CURIAE*, OF AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, counsel for *amicus curiae*, having secured the consent from counsel for Petitioners and Respondents, submits this brief in support of the Petition for Writ of Certiorari.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The American Association of Small Property Owners (AASPO) is a nonpartisan, nonprofit 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly – to make possible the American dream of building wealth through real estate. Based in Washington, DC, and with experts and advisors strategically located throughout the nation from California to New England, AASPO is the only national organization for small landlords, property owners and real estate investors to share information and strategies on important issues of the day.

Nationwide, there are some 10 million small owners of residential and commercial investment properties, accounting for more than $40 billion per year in direct economic activity. We are served by nearly 2,000 state and local associations around the country. AASPO's print

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

newsletter, The Small Property Owner, was voted the "Best Independent Real Estate Newsletter for 1996" by the National Association of Real Estate Editors. Our web site is at www.aaspo.org.

Our goal is to restore common sense and equity to federal, state and local regulations, tax liability and other laws that unjustly punish small property owners.

Our mission is to create public understanding and to build a network for small property owners whose exchange of experience and knowledge will help produce more informed and realistic public policies, from town halls to city hall, and from state houses to the White House and Capitol Hill.

America is at a crossroads.

We can promote property ownership and we can support small investors who provide housing for Americans. Or, we can destroy small business people with rent control, draconian regulatory practices, oppressive taxation and the ever-present threat of precious resources being consumed by litigation.

All too often, as is the situation in the instant case, the only shield standing between small property owners and overly aggressive and abusive governments is the United States Constitution, and a Judiciary willing to recognize and enforce our fundamental rights.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE RIGHTS OF PROPERTY OWNERS TO CONSTITUTIONALLY GUARANTEED DUE PROCESS SHOULD NOT BE EVISCERATED BY THE STATE COURT OF CALIFORNIA.

If the Galland case is allowed to stand, property owners in California will have no real protection against abusive or corrupt state adjudicative procedures. This decision will also set a dangerous precedent in other states where property owners could face similar, although less intense, intimidation by local governments.[2]

STATEMENT OF THE CASE

The Gallands had obtained an approximately one million dollar judgment under 42 U.S.C. Sec. 1983 (the Civil Rights Act) against the City of Clovis for violation of the Gallands' substantive and procedural due process rights in its implementation of its Mobile Home Rent Review Ordinance. The Gallands own a mobile home park in Clovis. Between 1988 and 1992 the City of Clovis

---

[2] We have seen the use of rental inspections of investment properties by local governments, correlating directly to the disfavorability factor of the particular property owner. In Davenport, IA, for example, Dan Lubell led the fight to stop the desecration of the American flag and restore a small business owner's flagpole after it was bulldozed down under order of the city attorney because the pole encroached one foot on city property. The new mayor reinstalled the flagpole but the career city attorney has since tried to reclassify Dan's contract sales as rentals so the city could inspect and reinspect virtually all of Dan's investment properties. No violations are suspected but the pattern continues.

subjected them to virtually unending rent control proceedings regarding the modest rent increases that the Gallands noticed each year. (In 1988 the rent increase at issue was $6.00, and the proceedings cost over $100,000.)

The trial court found that the City had knowingly perpetuated proceedings that held only an illusory benefit for the Gallands, since the proceedings continuously cost more than the increase at issue. The California Fifth Appellate District Court upheld the trial court's decision in June, 2000.

However, on February 5, 2001 the California Supreme Court reversed the decision and remanded the matter back to the trial court and city counsel for further proceedings.[3] Thus, after 12 years, the Gallands were set back to square one. (Or actually farther back than square one.)

SUMMARY OF ARGUMENT

We feel it is time for the U.S. Supreme Court to rectify California's maverick jurisprudence that conditions the availability of relief in land use cases to an exhaustion of state law procedures, and return California to an established constitutional regime.

[3] *Galland v. City of Clovis*, 24 Cal.4th 1003, 103 Cal.Rptr.2d 711 (2001).

ARGUMENT

"Property management under rent regulation is not an administrative skill. It is a martial art." Adrian Tiemann, New York City[4]

But even by New York standards, the abuse of the Gallands is almost incomprehensible. The City of Clovis had no written rules or guidelines. The Gallands were faced with administrative proceedings that generated continuing demands for whatever additional information various city officials thought they needed, but which served no useful purpose. The City compounded its demands for information with unreasonable time schedules. The California Supreme Court characterized the City's administrative process as "shifting," "costly," "inefficient," "ad hoc," "ill-considered," and "bureaucratic bungling." (App., pp. 49, 50.) But the same Court saw a "remedy" in returning the Gallands to this star chamber.

On page 8, the petition lays out the steps that property owners must go through *before* they can file a lawsuit under 42 U.S.C. Sec. 1983:

> The new California "remedy" requires property owners to jump through the following six (and likely more) hoops *before* they can invoke their

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[4] Dr. Adrian Tiemann is the president and one of the founders of Property Owning Women ("POWs, still prisoners of World War II"), a nonprofit association of small rental building owners in New York City, whose mission is in part to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health, and quality of life.

> federal Section 1983 remedy. (1) Seek approval of a rent increase from the Rent Control Commission. If dissatisfied, (2) appeal that to the city council. If still dissatisfied, (3) seek a writ of administrative mandate from the superior court to review the city council's decision. If such a review determined that the denial of a rent increase was confiscatory, then (4) return to the Rent Control Commission to seek a "*Kavanau* adjustment." If still turned down, then (5) appeal again to the city council. If still dissatisfied, then (6) seek a writ of administrative mandate from the superior court to determine whether the result (even with a *Kavanau* adjustment) is still confiscatory. Only after successful conclusion of this administrative and judicial "remedial" gauntlet, would the property owners be permitted for the first time to (7) pursue, in a third lawsuit, a damages remedy under Section 1983 – unless, by that time, they had exhausted not only these state preconditions to suit, but themselves and their bank accounts, as well.

The petition then states that "(t)wo Justices dissented on the ground that it was both unfair and unseemly to return the Gallands to the tender mercies of those who had willfully violated their constitutional rights, and that it also defied clear holdings of this Court" in the *Patsy* and *Felder* cases.[5]

AASPO couldn't agree more. From the standpoint of small property owners in this country, the significance of

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[5] *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and *Felder v. Casey*, 487 U.S. 131 (1988).

the Galland decision is the excessive and needless additional costs imposed on the property owner by the California Court, the unmitigated violation of due process, and the unlawful subordination of federal constitutional rights to state law procedures.

Sec. 1983 was designed to provide a unique federal remedy that is "judicially enforceable in the first instance." (*Felder*, 487 U.S. at 148.) It may not be conditioned on an exhaustion of state law remedies.

The California Supreme Court erroneously held that the Gallands could not as a matter of law pursue their federal Sec. 1983 rights until they had exhausted all state administrative proceedings.

Clearly the prospect of any meaningful relief becomes absurdly attenuated in the face of the procedures sanctioned by the Supreme Court of California. If a state can interpose these kinds of requirements between a small property owner and a 42 U.S.C. Sec. 1983 action, then a small property owner has no real protection under the United States Constitution.

CONCLUSION

AASPO believes that this Court needs to assert its rightful and proper role as the protector of the ordinary citizen to assure that state-sanctioned violations of federal constitutional rights are curtailed and that aggrieved parties are speedily and fully compensated. Abusive or corrupt state adjudicative procedures like those the Gallands endured have no place in American jurisprudence

and make a mockery of our democratic form of government and our right to life, liberty and property as guaranteed by the United States Constitution.

Respectfully submitted,

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No. 00-1903

In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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I.

BRIEF OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Western Manufactured Housing Communities ("Western Manufactured Housing") has received the parties' written consent to file this brief as amicus curiae in support of petitioners Roger and Virginia Galland. Letters of consent have been filed with the Clerk of the Court.[1]

II.

WESTERN MANUFACTURED HOUSING'S INTEREST AS AMICUS CURIAE ARISES OUT OF ITS STATUS AS AN ASSOCIATION REPRESENTING THE OWNERS OF 1550 MOBILEHOME PARKS, WHOSE OWNERS FREQUENTLY FACE THE SAME KIND OF PROBLEMS ARISING OUT OF REGULATION OF PARKS WHICH CREATED THE PROBLEMS THAT LED TO THIS PETITION.

The unfair treatment of the Gallands by the City of Clovis and its officials is not unique to this case. Other mobilehome park owners have faced or been threatened with similar treatment. Western Manufactured Housing is the largest organization in California, and one of the largest in the nation, representing the interests of

---

[1] No counsel for any party authored any part of this brief. No person or entity other than Western Manufactured Housing made any monetary contribution to the preparation or submission of this brief.

mobilehome park owners. The entire industry, in California and elsewhere, needs to be assured that the protections provided by law, and particularly the United States Constitution, are available to them in the event of overreaching by regulating entities.

III.

ARGUMENT

A. Introduction and Summary.

The petition for certiorari filed by the Gallands focuses primarily on the provisions of the Fifth Amendment to the United States Constitution, particularly the due process clause, and on 42 United States Code section 1983. Western Manufactured Housing will not restate the arguments persuasively made in that petition that focuses primarily on the supremacy of the federal constitution and the Civil Rights Act, and (1) how the remedies they create are available to all citizens of the United States victimized by wrongful acts of any state or local government, (2) these federal-created rights and protections can never be subservient to any state or local law or practice, and can be pursued *ab initio*, with no need to seek relief under or exhaust any state or local law.

The petition also demonstrates that the City of Clovis showed a lack of sensitivity to these principles, and that the California Supreme Court – overturning rulings of the trial court and court of appeal which recognized the arbitrary and unjust course of conduct in which the City was engaged – approved the City's improprieties.

Western Manufactured Housing endorses all the arguments made in the petition for certiorari, which show the sensitivity to the primacy of Federal law that the California Supreme Court failed to recognize – and has failed to recognize in a myriad of cases.[2]

Western Manufactured Housing will focus instead on a number of policy arguments showing the harm that these improper rulings work on those in the mobilehome park business, and indeed adversely impact the housing situation in California and the nation.

B. Where Laws Regulating Mobilehome Rental Rates Are Written Or Enforced, As Here, To Deny Owners Of Mobilehome Parks A Fair Return On Their Investment, A Policy Is Institutionalized Which Undermines The Goal Of Available And Affordable Housing – A Legislative Recognized Priority In California And A Priority Throughout The United States – And Creates And Magnifies A Problem Which Requires The Intervention Of This Court.

The Gallands sought reasonable rent increases to enable them to raise sufficient revenues from their

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[2] Since the facts necessary for this Court's inquiry are set out in the petition, they will not be repeated here.

It should be noted that while the petition focuses on the deprivation of substantive due process suffered by the Gallands, the complaint initially included a claim for deprivation of property without the requisite payment of just compensation. While this is not a theme pursued in the petition, it is apparent that such a deprivation took place and this would be an alternative remedy.

business to meet expenses and give them at least a minimal return on their investment. The Clovis Mobile Home Rent Review Commission, given the power to preclude increases that are "unreasonable," – misinterpreting facts and law and abusing its authority – torpedoed some efforts to raise rent and cut other raises sought to a fraction that stifled the very purpose for which the raises were sought – fair economic treatment. Even though the trial court and court of appeal ruled in favor of the Gallands – whose position was supported by overwhelming evidence – the California Supreme Court undid the correction and told the Gallands to return to the City where they would be subjected – in all likelihood – to another unfair and abusive procedure.

Where regulatory entities do not have mechanisms in place to insure that those regulated are given the opportunity to earn a livelihood in their profession, or when they have such mechanisms in place but ignore or abuse them, it is not only the regulated who suffer but all others in that business and – often – all other citizens.

That is important here because mobile homes contribute to the total stock of available housing. California, like some other states, is in the throes of a housing crisis. The legislature has given special recognition to this problem. California Government Code section 65580(a) provides:

> The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.

And California Government Code section 65589.5(a)(1) states that "[t]he lack of affordable housing is a critical problem which threatens the economic, environmental and social quality of life in California." *See also* Government Code sections 65300, 65589.5[a][2] ("California housing has become the most expensive in the nation"), 65700(b), 65580(b), and 65913.9. General plans, which all California cities must adopt, are required to include mobilehomes as part of their housing inventory. Government Code section 65583.[3]

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[3] The California housing crisis has predictably been the subject of a plethora of newspaper and magazine articles in recent years. In its amicus curiae brief before the California Supreme Court, Western Manufactured Housing identified over 25 such articles as well as several articles to similar effect from other jurisdictions. A representative sampling of California articles includes Bustillo, *Democrats Urge $1-Billion Plan To Ease Chronic Housing Shortage*, Los Angeles Times, May 5, 2000, pp. A3 and A22 (points out that California is building only about half the new homes each year experts state it needs); Wilcox, *Home Prices Up; Supply Shrinking*, Los Angeles Daily News May 18, 1999, p. 1; Strickland, *Fewer Californians Able To Afford Homes*, Los Angeles Times, April 7, 2000, p. C2; Dreier and Breidenbach, *How Do We Bridge The Housing Gap*, Los Angeles Times, September 12, 1999, p. M5; Boyarsky, *City Fails To Heed Housing Problems*, Los Angeles Times, March 20, 1997, p. A13; Hong, *10-Year Wait For Housing Help In L.A. Is Worst In U.S., HUD Says*, Los Angeles Times March 9, 1999, p. 13; Howard, *Report Urges County To Address Shortage Of Affordable Properties*, Los Angles Times, September 7, 1999, p. C1; Strickland, *California Sees Drop In Home Affordability*, Los Angeles Times, March 9, 2000, p. C1; and Lee, *The Housing Market's Missing In Action*, Los Angeles Times, October 3, 1999, p. C1. For a look at similar problems in New York, *see* Rozhon, *High Costs in Hamptons Force Workers Out*, New York Times, May 7, 2000, p. 1.

The kind of regulatory scheme here involved is a particularly severe form of rent control. Legal and social scholars have long recognized that – whatever marginal benefits it may arguably bring – such controls limit supply of housing and raise costs and rents. For example, in *Rent Control And The Theory of Efficient Regulation,* 54 Brooklyn Law Review 741, 767 (1988), the eminent Richard Epstein wrote:

> Without regulation, the price would rise, the demand would ease, and the supply would increase until the market was back in equilibrium.

In another article, Mr. Epstein demonstrated that a curtailment of rent controls and similar practices will enable tenants to get the most for their money. *Rent Control Revisited: One Reply To Seven Critics,* 54 Brooklyn Law Review 1281, 1304 (1989).

Specifically addressing the California mobilehome situation is Hirsch and Hirsch, *Legal-Economic Analysis of Rent Control in a Mobile Home Context: Placement Values and Vacancy Decontrol,* 35 U.C.L.A. Law Review 399, 463 (1988). The Hirsches reached the obvious conclusion that stringent regulation deters persons who might otherwise be so inclined from creating or investing in mobilehome parks. That this has happened in California is demonstrated by a statistical analysis that shows that in 1982 there were 5200 such parks with 388,800 spaces, while in 2000 those numbers had shrunk to 4959 parks with 369,137 spaces. *Mobilehome Park Maintenance and Inspection Report Pursuant To Health And Safety Code Section*

18400(1(g), published in 1999 by the California Department of Housing and Community Development, Division of Codes and Standards.

The courts have not been silent on this issue. In *Hall v. City of Santa Barbara,* 813 F.2d 198, 208 fn. 26 (9th Cir. 1986), disapproved by this Court on other grounds in *Yee v. City of Escondido,* 503 U.S. 519 (1992), the United States Court of Appeals for the Ninth Circuit wrote:

> We also note what appears to be a growing consensus that 'rent control causes a reduction in the quality of existing rental housing stock and discourages investment in new rental property,' actually exacerbating a problem it is intended to ameliorate. The Report of the President's Commission on Housing 1 (1982). *See, e.g.,* P. Samuelson & W. Nordhaus, *Economics* 393-94 (12th ed. 1985); W. Baumol & A. Blinder, *Economics: Principles and Policy 62-64* (3d ed. 1985); Muth, [*Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 691,] 693-98 [1983] *cf.* Frey, Prommerehne, Schneider & Gilbert, *Consensus and Dissension Among Economists: An Empirical Inquiry,* 74 Amer. Econ. Rev. 986, 988, 991 (1984) (fewer than 2 percent of United States economists surveyed at random generally disagreed with the proposition that '[a] ceiling on rents reduces the quantity and quality of housing available'); *see also Rent Control's Big Dilemma,* San Francisco Chron., Feb 28, 1986, at 76, col. 1.

What California's proliferating mobilehome rent control ordinances have generated is not affordable housing, but lawsuits mostly pitting – directly or indirectly – those

whose income comes from mobilehomes against regulating governmental entities. The following list is not exhaustive, but representative. In addition to *Yee* and *Hall*, cases include *Montclair Parkowners Ass'n v. City of Montclair*, 211 F.3d 1144 (9th Cir. 2000), withdrawn, 238 F.3d 1084 (9th Cir. 2001); *Rainbow Disposal Co. v. Escondido Mobilehome Park Rental Rev. Bd.*, 64 Cal. App. 4th 1159 (1998); *Yee v. Mobilehome Park Rental Rev. Bd.*, 62 Cal. App. 4th 1409 (1998); *Westwinds Mobile Home Park v. Mobilehome Park Rental Rev. Bd.*, 30 Cal. App. 84 (1994); *Adamson Companies v. City of Malibu*, 854 F. Supp. 1476 (C.D. Cal. 1994); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Sandpiper Mobile Village v. City of Carpenteria*, 10 Cal. App. 4th 542 (1993); *Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43 (1991); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951 (9th Cir. 1991); vacated in part 506 U.S. 802, *on remand* 987 F.2d 662 (9th Cir. 1992); *Oceanside Mobile Home Park Owners' Ass'n v. City of Oceanside*, 154 Cal. App. 3d 887 (1984). *Ehrlich v. Menezes*, 21 Cal. 4th 543 (1999), deserves special emphasis because there the California Supreme Court, the very court which destroyed the Gallands' rights, recognized (at 21 Cal. 4th 560) the diminishing supply of affordable housing in California.

In sum, this case involves not only a personal injury to the Gallands – which is significant and deserves correction – and a threat of ongoing injury and frustration to this amicus, Western Manufactured Housing Communities Association and others similarly situated throughout the United States, it involves significant public issues as well. If state and local governments use their enormous regulatory powers, not to encourage development of much-needed housing, including mobilehome park

housing, but to frustrate such development by making such development and investment in such development economically unfeasible, the critical need for housing – particularly affordable housing for low and middle income persons – the current and growing crisis will only be exacerbated.

IV.

CONCLUSION

The City of Clovis is using its' regulatory powers to deny deserving citizens, such as the Gallands, basic economic and constitutional rights. Other government entities in California are on a similar course, as are entities in other states. The remedy is there: 42 U.S.C. section 1983.

This Court has heard much in recent years about the abuse of landowner rights in California in a number of contexts. This is yet another example. This Court is urged to accept certiorari in this case, not only to rectify an injustice to the Gallands, but to preserve the integrity of the mobilehome industry, encourage the much-needed development of affordable housing in this country – and to again remind state and local governments of a lesson that they seem reluctant to learn: the United States Constitution is the supreme law of the land.

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In the

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ROGER and VIRGINIA GALLAND,

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v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a trial court found unchallenged substantial evidence that the process used by a city as part of its rent control program was confiscatory, in that it denied the owners of a regulated mobile home park a reasonable return, and used *ad hoc* procedures the state supreme court aptly characterized as the product of "unjustified" "bureaucratic bungling" that consumed more in regulatory transactional costs than the amount in controversy,

1. Was it permissible for the California Supreme Court to hold that the mobile home park owners are barred from pursuing an action under 42 U.S.C. § 1983 for deprivations of both substantive and procedural due process, unless they first exhaust lengthy (and newly created for this case) state remedial procedures, in violation of *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982)?

2. Was it permissible for the California Supreme Court to restrict due process recovery under 42 U.S.C. § 1983 to those cases in which the government "deliberately flouts the law," in conflict with other courts that use a broader standard?

3. Is it time for this Court to rectify California's maverick jurisprudence that conditions the availability of 42 U.S.C. § 1983 in land use cases on exhaustion of state law procedures, and return California to the constitutional regime laid down in *Felder v. Casey*, 487 U.S. 131 (1988)?

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INTEREST OF AMICI CURIAE[1]

For more than 25 years, Amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, No. 99-2047, 2001 U.S. LEXIS 4910 (June 28, 2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has participated as amicus curiae in nearly every major real property takings case heard by this Court in the past two decades. PLF also participated as amicus curiae in the Galland's case when it was before the California Supreme Court.

Amicus New England Legal Foundation (NELF), a nonprofit, public interest law firm, was incorporated in 1977. Its membership consists of individuals, businesses, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. *See, e.g., Palazzolo v. Rhode Island*, 2001 U.S. LEXIS 4910; *Crosby v. National*

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Pursuant to this Court's Rule 37.2(a), Amici Curiae affirm that this brief is filed pursuant to an agreement of counsel of record for all parties. The agreement was docketed on July 11, 2001.

Foreign Trade Council, 530 U.S. 363 (2000); *UNUM Life Insurance Company of America v. Ward*, 526 U.S. 358 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58 (2d Cir. 1997). NELF is concerned that the opinion of the California Supreme Court may serve as precedent in other states to eviscerate federal remedies for state administrative overreaching.

PLF and NELF believe that their public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

Mobilehome park owners Roger and Virginia Galland filed suit to overturn decisions of the Clovis Rent Review Commission and Clovis City Council (together City) to deny, in whole or in part, proposed rent increases. The Gallands sought damages for inverse condemnation, denial of substantive and procedural due process under the state and federal constitutions, and violation of civil rights under 42 U.S.C. section 1983.

The trial court held that City violated the Gallands' procedural and substantive due process rights and awarded $1,019,261.50 in damages pursuant to section 1983. In a unanimous opinion, the California court of appeal affirmed, holding that

> Clovis's application of the ordinance resulted in a rent review process that was unfair and so burdensome and expensive that it violated the

> Gallands' procedural and substantive due process rights and deprived them of a fair return on their regulated property.

Galland v. City of Clovis, 73 Cal. App. 4th 371, 373 (1999).

The California Supreme Court reversed. The court relied on its decision in a case which did not involve a 42 U.S.C. section 1983 claim—*Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997)—to impose new state administrative procedures which must be satisfied before a section 1983 claim is available in state court. In *Kavanau*, a majority of the California Supreme Court held that the "adjustment of future rents was generally sufficient to compensate for prior rent ceilings that were set so low as to be confiscatory." *Galland v. City of Clovis*, 16 P.3d 130, 134 (Cal. 2001). In this case, the California Supreme Court held that landlords who seek section 1983 damages from allegedly confiscatory rent control regulations must show that a confiscatory rent control ceiling was imposed and that relief via writ of mandate and a *Kavanau* adjustment is inadequate. *Galland*, 16 P.3d at 145. The court imposed this administrative hurdle even where, as in this case, the source of the constitutional injury is the administrative hearing process itself.

The ruling conflicts with this Court's holdings in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Felder v. Casey*, 487 U.S. 131 (1988), *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 498 (1982).

SUMMARY OF ARGUMENT

The California Supreme Court's decision in this case presents the question whether the remedy provided by 42 U.S.C. section 1983 applies to some federal rights more than others. Although the City of Clovis' rent review process as applied to the Gallands was time-consuming, burdensome,

expensive, and flawed, and was implemented by the use of secret procedures, obstructionist practices, and bureaucratic bungling, the court found that the Gallands have no section 1983 remedy. Instead, the Gallands' only remedy is no remedy at all—the court sent them back to the City to seek a rent adjustment to make up for years of confiscatory rents and abuse suffered as a result of City's administrative hearing process. As Justice Janice Brown pointed out in her dissenting opinion, "we have dipped into a 13-year-old proceeding, made some solemn pronouncements, and then turned our attention to other matters, but for the Gallands, it is a quest for justice that will never end." *Galland v. City of Clovis*, 16 P.3d at 163.

The court's cavalier treatment of the Gallands' federal right to due process was based on the view that the case dealt with economic injuries rather than the discriminatory or physically abusive behavior typically associated with civil rights actions brought under section 1983. That is a distinction which was specifically rejected by this Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, and *Wilson v. Garcia*, 471 U.S. 261.

ARGUMENT

I

SECTION 1983 PROVIDES A UNIQUE FEDERAL REMEDY FOR A BROAD RANGE OF CONSTITUTIONAL VIOLATIONS

The Civil Rights Act, 42 U.S.C. section 1983, provides, in relevant part, that every person who, under color of state law, subjects another person to the deprivation of any rights, privileges, or immunities secured by federal law, shall be liable to the injured party. Thus, a section 1983 claim arises when a local government uses power to deprive a person of a federal right, and that entity is liable to the aggrieved party for damages suffered. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 701 (1978).

Section 1983 hails from the Civil Rights Acts enacted after the Civil War to enforce newly adopted amendments to the Constitution—amendments intended to "dismantle the legal framework of slavery and to guarantee freed slaves the same political rights enjoyed by their former masters." Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 4 (1985).[2] But because the drafters of the Fourteenth Amendment did not limit the grant of constitutional rights enforceable against the States to the racial concerns of the moment (*see id.* at 4), the remedy for violation of federal rights has been applied to a wide range of topics.[3] As Justice Blackmun explained:

> Today, § 1983 properly stands for something different—for the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful. When the Fourteenth Amendment became part of the Constitution, it committed this Nation to

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[2] The Reconstruction Amendments, numbers Thirteen, Fourteen, and Fifteen, were adopted in 1865, 1868, and 1870, respectively. *Id.* at 4.

[3] Constitutional claims have been alleged under section 1983 covering a wide range of topics, some of which were catalogued in *Wilson v. Garcia*, 471 U.S. at 273:

> [D]iscrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard . . . .

(Footnotes omitted.)

> an order in which all governments, state as well as federal, were bound to respect the fundamental rights of individuals.

Blackmun, *supra*, at 28.

Justice Blackmun examined the proper scope of federal protection of individual rights under section 1983 and concluded that limitations on the scope of the statute should be viewed skeptically in light of the importance of maintaining a federal forum for the protection of federal rights. *Id.* He noted that, in some contexts, this Court has not allowed procedural and substantive doctrines that limit the role of section 1983. *Id.* For example, this Court has specifically declined to read into the statute a requirement that a section 1983 litigant exhaust state administrative remedies. *Id.*; 516; *Felder v. Casey*, 487 U.S. at 153; *Patsy v. Board of Regents of the State of Florida*, 457 U.S. at 500-01. In *Felder v. Casey*, this Court said that a state's attempt to condition the right to recover compensation for the deprivation of civil rights

> upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.

Felder v. Casey, 487 U.S. at 153.

II

THE CALIFORNIA SUPREME COURT DENIED A SECTION 1983 REMEDY FOR DUE PROCESS VIOLATIONS IN THE CONTEXT OF PROPERTY RIGHTS

Disregarding this Court's precedent, the California Supreme Court denied the Gallands' section 1983 remedy and sent them back to the very rent control board that imposed

confiscatory rents and subjected them to an administrative hearing process that even the majority characterized as involving "shifting, costly, and at times ill-considered requests for information" (*Galland v. City of Clovis*, 16 P.3d at 153), "bureaucratic bungling" (*id.*), and "unjustified delay" (*id.* at 156).[4] The *Galland* majority held that landlords who seek section 1983 damages from allegedly confiscatory rent control regulations must show that a confiscatory rent control ceiling was imposed and that relief via a writ of mandate and adjustment of future rents is inadequate. *Galland*, 16 P.3d at 145. And the majority set out a labyrinthine course of action to be followed if questions arise about procedural demands which may be compensable under section 1983. *Id.* at 153.

Associate Justice Janice Brown dissented and suggested that the majority's decision was the result of "the reduced importance the majority gives to the constitutional interest that is at stake." *Id.* at 159. Justice Brown wrote that the "real mischief of the majority's opinion lies in its disparate treatment of property rights when enforcing section 1983" (*id.* at 166), and noted that the majority would not "be so quick to eviscerate

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[4] California Associate Justice Janice Brown put it more colorfully:

> Clovis said to the Gallands, in effect: Before you can raise rents, you must prove you're not making too big a profit, and we will make it impossible, as a practical matter, for you to meet this burden of proof. The Gallands responded to Clovis's regulatory arrogance in much the same way as Lewis Carroll's Alice did when she found herself in a similar situation: "'I don't think they play at all fairly,' Alice began, in rather a complaining tone, '. . . and they don't seem to have any rules in particular; at least, if there are, nobody attends to them—and you've no idea how confusing it is . . . .' " (Carroll, Alice's Adventures in Wonderland (1985 ed.) p. 115.) To which the majority replies: Go back and try again.

Galland v. City of Clovis, 16 P.3d at 160 (Brown, J., dissenting).

section 1983 in a classic civil rights case" (*id.* at 162). Examples of "classic civil rights cases" include such facts as a black firefighter being denied promotions and raises in a city with a long history of discrimination or a city discriminating against a black-owned business when awarding contracts. *Id.* at 162. Justice Brown emphasized that the availability of a remedy under section 1983 does not depend on the nature of the underlying claim, but rather on the existence of arbitrary and unfair treatment by government.

> It is no answer to say that this case concerns merely an economic injury and that a race is a "suspect class" requiring different treatment under the Constitution from price regulation. Arbitrary and unfair treatment by the government is not merely an economic injury; it is also, like race discrimination, an affront to personal dignity. While the standards for finding a constitutional violation may differ, the Constitution does not establish a hierarchy of rights in which some are deemed more worthy of protection than others.

Id. (citation omitted).

III

SECTION 1983 CLAIMS BASED ON PROPERTY RIGHTS ARE ENTITLED TO THE SAME SCRUTINY AS OTHER SECTION 1983 CLAIMS

Indeed, this Court does not classify section 1983 claims based on the nature of the underlying right asserted. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 711; *Wilson v. Garcia*, 471 U.S. at 271-72. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, developer Del Monte Dunes submitted one proposal after another to develop an

ocean-front parcel of land (526 U.S. at 693) in what the majority referred to as "the tortuous and protracted history of attempts to develop the property" (*id.* at 699). Although Del Monte Dunes complied numerous times with the City's ever-changing conditions of development, the development proposals were repeatedly rejected by the City of Monterey. Del Monte Dunes brought an action pursuant to 42 U.S.C. section 1983, alleging that rejection of the final development proposal violated their right to Due Process and Equal Protection and constituted a regulatory taking. One of the questions before this Court was whether a regulatory takings case brought pursuant to section 1983 was properly submitted to a jury.

The City of Monterey urged this Court to determine the applicability of the Seventh Amendment right to a jury by looking at the underlying constitutional right asserted (a regulatory taking) instead of the statutory basis of the claim (section 1983). *Id.* at 711. This Court declined, citing the analysis in Justice Scalia's concurring opinion. *Id.*

> [Section] 1983 is, so to speak, a prism through which many different lights may pass. . . . I believe that, in analyzing this cause of action for Seventh Amendment purposes, the proper focus is on the prism itself, not on the particular ray that happens to be passing through in the present case.

Id. at 723-24 (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia compared the analysis in *Wilson v. Garcia*, 471 U.S. 261, where the Court applied 42 U.S.C. section 1988(a) to determine what statute of limitations applies in section 1983 cases.

> In applying this provision, the Court identified as one of the steps necessary for its analysis resolution of precisely the question I have been discussing here: "We must . . . decide whether all § 1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." 471 U.S. at 268. The Court concluded (as I do here) that all § 1983 claims should be characterized in the same way.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. at 725 (Scalia, J., concurring in part and concurring in the judgment).

Thus, in *Galland*, the California Supreme Court was wrong to focus on the nature of the claim—whether it is characterized as one relating to economic injuries, property rights, or rent-control—when it should have concentrated on the injuries suffered by the Gallands as a result of the violation of their civil rights by the City of Clovis. The violations of civil rights in the Gallands' case are similar to those in other section 1983 cases arising from abusive administrative proceedings—cases where section 1983 remedies were available to property owners. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 698-99, discussed above, where over a five-year period Del Monte Dunes attempted to satisfy the City's "shifting and sometimes inconsistent positions" by submitting 19 different site plans. Del Monte Dunes received five formal decisions, none of which permitted development of its ocean-front parcel. *Id.* at 698.

Abuse of government power takes different forms. While allegations of denial of civil rights in cases of police misconduct (*e.g.*, *Monroe v. Pape*, 365 U.S. 167, 169 (1961)) and racial discrimination (*e.g.*, *Patsy v. Board of Regents of the State of Florida*, 457 U.S. at 498) are more sympathetic on a visceral level, abuse of government power is just as real in the context of property rights.

> "[T]he fourteenth amendment's due process clause protects property no less than life and liberty. . . . To the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional constraints.

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398, 1408-09 (9th Cir. 1989).

Section 1983 provides damages for constitutional violations regardless of the circumstances of the deprivation at issue. This Court should grant review of this case to ensure that property owners receive the same constitutional protections as others whose civil rights are violated.

> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

James Madison, *National Gazette, March 29, 1792, in Madison Writings* 517 (Literary Classics of the United States, Inc. ed. 1999).

CONCLUSION

Amici respectfully request that this Court grant the petition for writ of certiorari.

DATED: July, 2001.

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In The

Supreme Court of the United States

ROGER AND VIRGINA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICI CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORIARI

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THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE CALIFORNIA SHOULD NOT BE PERMITTED TO PRE-EMPT FEDERAL LAW AND CIRCUMVENT DUE PROCESS RECOVERY UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.. 4

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BRIEF OF *AMICI CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae*, the California Association of REALTORS® (hereinafter CAR) and the National Association of REALTORS® (hereinafter NAR), submit this brief in support of the petitioners, Roger and Virginia Galland, in their Petition for Writ of Certiorari.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

CAR is a non-profit, voluntary, trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 94,000 persons licensed as real estate brokers and salespersons by the State of California, as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. Furthermore, CAR is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and the protection of private property rights. CAR pursues its objectives through a variety of

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[1] The parties have consented to the filing of this brief. The joint letter of consent is on file with the Clerk of the U. S. Supreme Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

methods, including education of its members, creation of standard form agreements for use in real estate transactions, lobbying, providing legal advice to its members, and participation as *amicus curiae* in relevant court cases.

Members of CAR assist the public in buying, selling, leasing, developing and managing residential, commercial and industrial real estate as well as mobilehomes. Thus, these members, as well as the public they assist, are directly impacted by the actions of local municipalities in regulating real property as well as mobilehomes.

NAR is a non-profit professional association incorporated in Illinois representing persons in the real estate industry nationwide. As such, NAR is a champion of the rights of real property owners throughout the entire country. NAR's membership, which includes all the REALTOR® members of CAR as well as the members of REALTOR® associations in every other state, consists of approximately 760,000 persons involved in all aspects of the real estate profession, including brokerage, management, appraisal, and counseling. Through its participation in cases before this Court and others, NAR has long sought to preserve for property owners the rights guaranteed to them by the 5th and 14th Amendments to the Constitution.

Unfortunately, due to the oftentimes misguided, or in some cases even hostile, actions that local municipalities and courts have taken with regard to landowners' constitutional rights, both CAR and NAR have been actively involved in land use cases. CAR and NAR have participated previously as *amici curiae* before numerous courts including the seminal cases of *Nollan v. California Coastal*

Comm'n, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and more recently in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). NAR also participated as *amicus curiae* in *Preseault v. ICC*, 494 U.S. 1 (1990).

The current state of affairs in California again makes it imperative that CAR and NAR take on their responsibilities as *amici curiae*. In the case before this Court, the California Supreme Court has denied landowners their constitutional rights by barring action under 42 U.S.C. § 1983 unless these landowners first exhaust lengthy and burdensome administrative procedures. The California Supreme Court's decision thus represents a fundamental misunderstanding and misapplication of this Court's well-established precedents, requiring correction and clarification by this Court.

CAR, NAR and their members are concerned with the abuse of power by local government that infringes upon the constitutional rights of landowners. The California Supreme Court's constitutionally flawed analysis precludes a property owner from the opportunity to challenge the constitutional propriety of a regulator's excessive and burdensome administrative proceedings unless and until the property owner endures further lengthy and costly administrative proceedings. As stated by California Supreme Court Justice Brown in her dissenting opinion describing the action taken by the court, "We now intervene to eviscerate a federal civil rights remedy whose very purpose is to provide an alternative to abusive or corrupt state adjudicative procedures like those the Gallands had to endure. . . . " *Galland v. City of*

Clovis, 24 Cal. 4th 1003, 1046 (2001). This Court's action is necessary to correct this error by the influential California Supreme Court, lest it be replicated by courts elsewhere to permit further constitutional injury to property owners throughout our nation.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE CALIFORNIA SHOULD NOT BE PERMITTED TO PRE-EMPT FEDERAL LAW AND CIRCUMVENT DUE PROCESS RECOVERY UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. In Violation of Constitutional Law, California Requires Exhaustion of Administrative Remedies Prior to Allowing a Section 1983 Claim.

Landowners like the Gallands, who suffer economic harm as a result of unconstitutionally overzealous or excessive land use regulation, have various constitutional remedies available, including a 5th Amendment takings claim, a 14th Amendment equal protection claim, and 14th Amendment procedural and substantive due process claims (42 U.S.C. § 1983). In the land use arena, this Court has consistently protected landowners against due process violations in contravention of the 14th Amendment. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Previous decisions of this Court, as well as prior California case law, have made it eminently clear that a plaintiff need not exhaust state judicial or administrative remedies prior to filing a due process claim in either state

or federal court. *Felder v. Casey*, 487 U.S. 131 (1988) (Wisconsin notice of claim statute requiring special procedures prior to filing Section 1983 claim is pre-empted pursuant to the Supremacy Clause); *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) (Exhaustion of state administrative remedies is not a prerequisite to an action under Section 1983); *Brosterhous v. State Bar of California*, 12 Cal. 4th 315 (1995) (Section 1983 action cannot be limited by the existence of state procedures to arbitrate the issues).

In this case now before the Court, however, *Galland v. City of Clovis*, 24 Cal. 4th 1003 (2001), the California Supreme Court carves an exception to the due process rights secured by the federal constitution in relation to land use and, in particular, regulation of mobilehome park rents. The California Supreme Court held that a landowner may maintain an action for damages under Section 1983 only after the landowner first exhausts administrative remedies. Specifically, according to the court, a governmental agency must, in effect, be afforded the opportunity to conduct further administrative hearings in an attempt to undo the grave constitutional violations it caused in the first round of administrative hearings. As noted by Justice Brown in her dissenting opinion, "this exhaustion requirement applies even where unfairness in the administrative hearing process was the source of the constitutional injury. This conclusion directly contravenes *Patsy v. Florida Board of Regents*. . . . " *Galland* at 1045. There is no basis for an exception to the principle embodied in and embraced by *Patsy* in the context of Section 1983 challenges to land use regulation, and it is essential that this Court review this

case in order to correct the contrary holding of the California Supreme Court.

The facts of this case will give any landowner nightmares. The egregious acts of the rent control commission (Commission) and city council (Council) of the City of Clovis (collectively, hereinafter, Clovis) were condemned by both the trial court and the California Court of Appeal. The trial court described the Clovis rent review process as "so time consuming burdensome and expensive that the potential benefits of participating in the process were nonexistent and illusory, all of which the Commission and Council were well aware, but nevertheless, continued to perpetuate." CT 2571-2572 (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 26) (Petitioner's Appendix at 149).[2]

According to the California Court of Appeal, " 'the long and tortured path this case has taken to date militates against sending the matter back for further administrative proceedings addressing these ancient claims.' " *Galland* at 1029.

The Clovis rent control ordinance itself invites the tortuous path to which Petitioners were subject, since it provides no standards for calculating appropriate rental increases.[3] Prior to the administrative review hearings for the 1988 rent increase, the Gallands requested, but never

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[2] CT refers to the trial court transcript; Supp CT refers to the supplemental trial court transcript of the administrative proceeding.

[3] In 1993, Clovis amended its rent control ordinance to permit automatic annual rent increases tied to the Consumer Price Index. *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1018.

received, any clear guidelines as to the materials and information Clovis wanted produced for the administrative hearings. Subsequently, Clovis managed to make many costly and unreasonable demands for information (e.g., confidential information on the other mobilehome parks managed by their property manager, such as the cash flow for the sixteen other parks, including figures for income and expenses for *ten years for each park*).[4] Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 13 (Petitioner's Appendix at 8-9).

The Gallands incurred huge legal and expert witness fees in educating the Commission and the Council as to the appropriate guidelines in applying the Clovis rent control ordinance. During the Commission hearing, in reply to the Gallands' claim that they had incurred these fees in response to the order of the Council, the Chairperson of the Commission, Charlene Wallert, stated:

> You were faced with a council with the idea of having to do this and you knew in your mind that it was expensive and probably you knew that even if you got the $6 rate increase, it wouldn't pay for the money you've expended on this. Why at that point did[n't] you say, "this is too expensive for me. I'm just going to drop the whole thing and apply for a rent increase

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[4] The administrative proceedings on the 1988 $6.00 per month rental increase cost the Gallands $141,257. Supp. CT 1 *et seq.* (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 13). The cost of the 1989 proceedings was $31,955. Supp. CT 1 *et seq.* (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 17). The 1990 proceedings cost the Gallands $47,541. Supp. CT 1 *et seq.* (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 21).

next year?" Supp. CT 2662:3-12 (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 15).

Thus, the ordinance, and the California Supreme Court's elimination of the Gallands' right to challenge the constitutionality of its application to them, places the Gallands between the proverbial rock and a hard place. In order to get their $6 per month rental increase, they had to educate the Commission and Council regarding the appropriate method of determining a reasonable rate of income and an appropriate price index to apply to factor in inflation. In order to satisfy Clovis's demands for additional information, the Gallands had to hire costly legal and financial experts to compile extensive narrative information as well as charts and tables comparing various mobilehome parks.

Notwithstanding the Gallands' substantial investment of time, effort, and money, the Commission held that the Gallands could not treat these fees as operating costs – meaning they cannot recoup these costs by increasing the rental rates. Even the President of the Commission expressed surprise that the Gallands bothered to ask for a rental increase when the cost of asking was greater than the return from the rental increase. Clovis had effectively created a Catch-22 situation for landowners!

Indeed, the critical importance of the Gallands' right to challenge the city's action is reinforced and illustrated by Clovis's delay of the administrative process, causing further losses and constitutional injury to the Gallands. For example, the hearing on the 1988 rent increase, in which the Commission disallowed the legal and expert

fees as operating expenses, was concluded on December 13, 1989, (Supp. CT 2702) (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 16), but the Gallands were not permitted to appeal this decision to the Council until the final written decision was issued by the Commission. Nevertheless, the Commission refused to issue a final decision until January 29, 1992 – two years later – and they only did so after the Gallands sought a court order directing its issuance. Supp. CT 2462 *et seq.* (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 16).

Thus, the egregiousness of the City's actions is clear, and is only further aggravated by the California Supreme Court's denial of the Gallands' right to even challenge those actions until after the Gallands first pursued further proceedings before the City. This Court's intervention is essential to correct these abuses before that flawed result is adopted in other jurisdictions as well.

B. The California Supreme Court Has Created a Convoluted Process For Analyzing Due Process Violations That, By Itself, Violates Due Process.

The California Supreme Court has created a needless, unnecessarily complicated, unprecedented and unjust procedure that rental property owners must endure to seek redress for due process violations by California rent control regulators. This is apparent in two respects. First, the court focused on the injury imposed by "confiscatorily low rents" and concluded that, with respect to the due process rights of the owner, such economic deprivations must be treated the same as those caused by a 5th Amendment taking. The court suggests that there has

been no due process violation if a *Kavanau* adjustment could compensate the landowner for the confiscatorily low rents.[5]

According to the court in *Kavanau*, the adjustment in future rents for due process violations is simply akin to the amortization of the costs of capital improvements over the useful life of those improvements. *Kavanau* at 769. What is the useful life of the costs of excessive overburdensome administrative proceedings? *Kavanau* does not provide an answer. Furthermore, in *Kavanau*, the court was not dealing with a flawed *process* as we have in the case before this Court, but instead a flawed *result*. However, the California Supreme Court in *Galland*, acknowledging that a *Kavanau* adjustment might prove to be inadequate to make the landowner whole, provides the following rule:

> [W]hen landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate. *Galland* at 1025.

Unlike a 5th Amendment inverse condemnation claim, however, where an *element* of the claim is the

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[5] A *Kavanau* adjustment refers to the remedy created by the California Supreme Court in *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761 (1997), for an inverse condemnation claim. The court held that Kavanau was not entitled to maintain his inverse condemnation action because he could obtain "a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the rent regulation process." *Id.* at 767.

government's failure to provide just compensation, a due process violation occurs where the government has *acted* in a sufficiently arbitrary fashion and injured the claimant. Whether or not the government has later provided a remedy for the injury does not eliminate the due process violation. Thus, there is no constitutional basis to treat inverse condemnation and due process claims similar for Section 1983 purposes, and subject the latter, like the former, to the *Kavanau* adjustment process.

Second, the California Supreme Court also erred in its consideration of the "excessive procedural costs" – those increased costs arising from the flawed rent control review process and the resultant litigation. After establishing a new "deliberately flouts the law" standard for finding a violation of substantive due process, the court rejects the trial court's findings and remands the cause to the trial court again. *Galland* at 1030-1040.

In essence, the California Supreme Court has created a procedural nightmare for a landowner who must go to the trial court for a rehearing to determine if Clovis has "deliberately flouted the law." In the event Clovis is found guilty only of "bureaucratic bungling," short of the California Supreme Court's standard for a constitutional violation, the landowner may have to return again to Clovis for another attempted *Kavanau* adjustment. Should the excessive administrative costs be so great that a *Kavanau* adjustment is not possible, then must the landowner go to the trial court again? Will Clovis now be found guilty of a constitutional violation if the administrative and procedural costs are so great that a *Kavanau* adjustment is impossible? Or, will the landowner have to

go bankrupt because the costs created by the administrative process exceed the future flow of income from rents?

The entire convoluted process created by the California Supreme Court places an additional and unwarranted hardship on landowners who have already spent huge sums of money in their frustrated attempts to comply with the requirements of a vague rent control ordinance and a demanding, insatiable Commission and Council.

This process is reminiscent of another in the land use arena, as described by a legal scholar:

> Local governments . . . may violate the substantive due process rights of landowners, and then rely on lengthy local appeals processes to forestall suit in federal court. Landowners of limited financial means may not be able to endure the lengthy administrative processes and litigation. . . . " David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 Mich. L. Rev. 492, 496 (1996).

Clearly the convoluted process crafted by the California Supreme Court for bringing Section 1983 due process claims places such a totally unreasonable burden on California rental property owners that the process itself violates landowners' constitutional rights to due process under the law.

C. California's Reliance On a *Kavanau* Adjustment Violates Public Policy By Placing the Burden of the Excessive Damages Caused By the City On Innocent Parties.

This Court should also review this case because of yet another unacceptable effect of the California Supreme Court's extraordinarily strict "flouts the law" standard for finding a violation of the Gallands' due process rights resulting from the unduly burdensome and costly process for seeking a rent increase: Because of the court's determination that the "excessive procedural costs" may be considered and included when determining allowable rental increases pursuant to a *Kavanau* adjustment, the court's holding allows these costs to be imposed on innocent parties. *Galland* at 1040. By insisting that these "excessive procedural costs" be taken into account, if at all, as part of the *Kavanau* adjustment, the court is imposing absolutely no liability upon Clovis for its due process violations and is instead placing the burden on innocent landowners as well as innocent mobilehome tenants caught in the middle. *Id.* at 1040.

The California Supreme Court will hold Clovis liable for these costs only if the city imposed the costs originally "in deliberate contravention of the law to obstruct the Gallands' constitutionally based property rights." *Id.* at 1040. Thus, not only does the California Supreme Court place a costly burden upon landowners by its creation of a standard that allows a tremendous level of abuse against landowners before any liability is imposed upon the city, but to the extent the city has not acted quite outrageously enough to meet that standard, the

court's holding allows those costs to be shifted to the present and future tenants of the owner.

Thus, the California Supreme Court holding means that despite "shifting" demands, "costly" demands, "ill-considered requests for information" that create a burdensome, costly, outrageously expensive hearing process by governmental agencies, ultimately the landowner and the tenants are the ones most likely to foot the bill. The governmental agency responsible for all the additional unreasonable costs can get away with violating due process. Landowners and the mostly economically-disadvantaged tenants of mobilehome parks will have to pay for the city's egregious mistakes.

The California Supreme Court in *Galland* has therefore, in effect, carved an exception to Section 1983 remedies at the expense of the federal constitutional rights of California mobilehome park owners and tenants. Not only does this "exception" violate the constitutional rights of California landowners and tenants, but it will have a negative impact ultimately on the availability of low-cost housing such as mobilehomes. Moreover, unless this Court acts to correct this result and declare this abusive process constitutionally defective, other courts will undoubtedly follow California's high court holding and subject property owners in other jurisdictions to a like fate. This consequence is of great concern to both CAR and NAR.

There are mobilehome parks not only throughout California, but the entire nation. In fact, as the number of retired Americans increases so will the need for low-cost housing such as mobilehomes. If allowed to stand, the

ruling in *Galland* will have a deleterious impact on the availability of this type of low-cost housing. Owners of mobilehome parks must accept rent control as a cost of being in the rental business. However, park owners cannot afford to pay the excessive and burdensome administrative costs resulting from municipalities' "bureaucratic bungling" when park owners seek rental adjustments merely to earn a fair and reasonable return on their property.

The California Supreme Court offers the following advice to mobilehome investors:

> For those price-regulated investments that fall above the constitutional minimum, but are nonetheless disappointing to investor expectations, the solution is not constitutional litigation but, as with nonregulated investments, the liquidation of the investments and the transfer of capital to more lucrative enterprises. *Galland* at 1026.

Mobilehome park owners, like the Gallands, may very well heed the advice of the California Supreme Court and turn their mobilehome parks into more lucrative enterprises at the expense of those tenants who most need low-cost housing.

CONCLUSION

Despite the trial court's findings and California Court of Appeal's conclusions that Clovis violated the Gallands' due process rights, the California Supreme Court holds that "remand to the city is what *Kavanau*

prescribes. . . . Clovis has endeavored to amend its rent control ordinance to make it more efficient and expeditious. If Clovis engages, however, in further needless delay, then a writ of mandate to the trial court may legitimately request that the court intervene to set the proper rental rates, and the city may be liable for section 1983 damages." *Galland* at 1029. The California Supreme Court then aggravates this error by also establishing an unprecedented and extraordinarily high standard for determining whether the procedure to which the owners were subject in seeking an adjustment to the rents violated their due process rights.

The holding in *Galland* creates an exception to well-established constitutional law. This Court should not allow this decision to stand. To deny a writ of certiorari is to suggest that *Galland* correctly reflects the law as established by this Court. Clovis and other governmental entities in California are now free to trample landowners' due process rights. It makes no sense. Nor is it fair. California landowners should not be deprived of their rights under the U.S. Constitution.

For the reasons stated herein, this Court should grant the Petition for a Writ of Certiorari.

DATED: July 23, 2001

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No. 00-1903

In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

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INTRODUCTION

The California Supreme Court stated the central issue – an overtly *federal* issue – on the first page of its opinion in the clearest possible words. There, after noting its recent decision in *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761 (1997), the Court said:

> "We left open the question, however, whether a future rent adjustment, which we will refer to as a *Kavanau* adjustment, also *forecloses a suit for damages for violation of a right to constitutional due process (U.S. Const., 5th & 14th Amends.) under 42 United States Code section 1983.*" (Pet. App., p. 1; emphasis added.)[1]

The Court then proceeded to "address that question here" and to hold that a Section 1983 suit could only be brought – if at all – *after* additional state administrative and judicial proceedings (to determine and review a "*Kavanau* adjustment") had been concluded. (Pet. App. pp. 1-2.)

Even if a "*Kavanau* adjustment" could provide relief (a dubious proposition, as the dissenting opinions below make clear), California's conclusion simply defies this Court's settled teachings:

> "[W]e conclude that *exhaustion of state administrative remedies should not be required* as a prerequisite to bringing an action pursuant to § 1983." (*Patsy v. Board of Regents*, 457 U.S. 496, 516 [1982]; emphasis added.)

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[1] Please note that the basis for the Court's opinion was thus *entirely* federal.

> " . . . 'the dominant characteristic of civil rights actions [is that] *they belong in court.*' [Citation.] 'These causes of action,' we have explained, 'exist *independent of any other legal or administrative relief that may be available as a matter of federal or state law*. They are judicially enforceable *in the first instance*.' [Citation.]" (*Felder v. Casey*, 487 U.S. 131, 148 [1988]; italics by the Court; underscoring added.)[2]

With all due respect to the California Supreme Court and counsel for the City, the decision below is wholly in conflict with this Court's settled decisions, and not as

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[2] The City's Brief in Opposition is thus off base. That brief opens by accusing the Gallands of failing to accurately portray the decision of the California Supreme Court, asserting that "[t]here are two principal holdings in this case." (Br. in Opp., p. 1.) To find the first, the City has to go to pages 30-34 of the opinion, while it finds the second at pages 44-45. (Br. in Opp., 1.) However, as noted above, the California Supreme Court candidly laid bare its central issue – a federal one – on the first page, indeed in the first paragraph, of its opinion. Thus, the court below – unlike the City – faced the federal issue up front, and did not reach either of the matters discussed by the City until *after* it held that the Gallands' federal Section 1983 action had to be deferred until after various state administrative proceedings, and *after* it set up impermissible roadblocks in the path of constitutionally aggrieved landowners seeking relief under Section 1983, as is their *federal* right. Indeed, it *could not* have reached those other issues without first vacating the decisions of the trial court and the Court of Appeal awarding compensatory damages under Section 1983.

Because it refuses to acknowledge the fundamental issue decided by the California Supreme Court, and the fact that California's invention is flatly contrary to this Court's decisions, the City's brief is of little assistance to the Court.

represented in the City's Brief in Opposition. It improperly relegates Section 1983 to a status subservient to state administrative and judicial proceedings. Corrective action by this Court is imperative.

I

THE ISSUE IS NOT *WHAT* THE CALIFORNIA SUPREME COURT ORDERED DONE ON REMAND, BUT *THAT* IT ORDERED A REMAND AT ALL

The City's brief focuses on the substantive issues that would be involved on remand without recognizing that, under settled jurisprudence of this Court, no remand at all is appropriate here. The fundamental *federal* error committed by the California Supreme Court was in ordering *any* sort of remand that set aside the trial court's Section 1983 judgment *for the avowed purpose of pursuing state law administrative preconditions to a Section 1983 action*. Thus, to argue that "the two principal holdings in this case" deal with the standards for determining the constitutionality of price controls and the lengths to which an administrative agency can go in mistreating mobile home park owners before crossing the constitutional line (Br. in Opp., p. 1) wholly misses the point.[3]

---

[3] This is entirely apart from the fact that the trial court found as a matter of fact, after extensive evidentiary hearings, that the City's actions *were* confiscatory and that its process *was* outrageous (Pet. App., pp. 143-144) – *and the City did not appeal from any of the factual findings* (Pet. App., p. 107), which are thus final. When that happens, this Court has accepted the factual findings of the actual fact finder, even when they conflict with later conclusions by a state supreme court. (See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 188 [1928].)

Under settled Section 1983 jurisprudence, the California Supreme Court should have kept its hands off the Section 1983 judgment instead of vacating it on the ground that other state administrative proceedings had to be followed first.

The California Supreme Court's defiance of this Court's Section 1983 cases by inventing a precondition to invoking Section 1983 is all the more inexplicable in light of *Patsy v. Board of Regents*, 457 U.S. 496 (1982). There, this Court reviewed an *en banc* decision of the 5th Circuit Court of Appeals that had crafted what it called a "flexible" exhaustion policy for Section 1983 cases, including a detailed list of factors to consider in deciding whether such preconditions could be required. (See *Patsy*, 457 U.S. at 499.) In undertaking that review, the Court noted that there had been unhappiness expressed by some courts and commentators with the idea that there could be no state remedy exhaustion requirement in Section 1983 cases. (457 U.S. at 500.) Recognizing that it was "not writing on a clean slate" (457 U.S. at 500), this Court conducted an exhaustive re-examination of its jurisprudence (*including at least nine decisions during the preceding two decades* [457 U.S. at 500]), as well as the legislative history of Section 1983 and some more recent legislation before announcing its holding:

> "[W]e conclude that *exhaustion of state administrative remedies should not be required* as a prerequisite to bringing an action pursuant to § 1983." (*Patsy*, 457 U.S. at 516; emphasis added.)

That conclusion could not have been more clearly stated. Thus, when the California Supreme Court boldly asserted that it would "address the question" of whether

a state administrative remedial process to seek a "*Kavanau* adjustment" "forecloses a suit for damages for violation of a right to constitutional due process (U.S. Const., 5th and 14th Amends.) under 42 United States Code section 1983)" (Pet. App., p. 1) and then decided that such a state administrative proceeding *does* "foreclose" a Section 1983 suit (Pet. App., pp. 1-2), it plainly defied this Court's decision in *Patsy*. Nor was that inadvertent. Both dissenting opinions flagged the issue and called attention to its erroneous disposition by the majority in language that is clear beyond quibble:

> "The result *compelled* by *Patsy* . . . is *clear*. Since a party need not exhaust state administrative remedies before filing a section 1983 suit in state court, this court *cannot validly require* the Gallands to invoke and exhaust a '*Kavanau* adjustment' before pursuing their section 1983 claim." (Pet. App., p. 61; emphasis added; Jones, J., concurring and dissenting.)

> "The majority holds that, before a plaintiff may obtain damages under section 1983, he or she must first exhaust administrative remedies by seeking regulatory relief from the same agency that imposed the confiscatory price regulations in the first place. . . . This conclusion *directly contravenes Patsy v. Florida Board of Regents*. . . . " (Pet. App., pp. 64-65; emphasis added; Brown, J., dissenting.)

The California Supreme Court's decision cannot stand before the force of *Patsy*, its progenitors and its progeny. The fact that the City has chosen not to defend this blatant evasion of the law, but seeks instead to divert attention away from it by discoursing on what to do on

remand, speaks volumes for the bankruptcy of the California position.

II

UNDER SETTLED DECISIONS OF THIS COURT, THE DECISION BELOW IS FINAL FOR SUPREME COURT REVIEW

The City asserts that, because the California Supreme Court reversed the Court of Appeals and remanded the matter for further consideration, there is no "final" judgment for review here.

Wrong. A remand by a state court is not talismanic, certainly not where its avowed purpose is for consideration of matters this Court has held *not* to be either required or permitted.

This Court explained in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), and reiterated recently in *Florida v. Thomas*, ___ U.S. ___, 121 S.Ct. 1905 (2001) that the finality rule "ha[s] not been administered in . . . a mechanical fashion. . . . " Both *Cox* and *Thomas* list four categories of cases that may appear superficially not to be "final," but which are actually final for purposes of Supreme Court review. This case fits at least two of those categories.

First, there are cases "in which the federal issue, finally decided by the highest court in the State, will survive and require [U.S. Supreme Court] decision regardless of the outcome of further state court proceedings." (*Cox*, 420 U.S. at 480.) Here, the central federal

issue is whether a State may create preconditions to lawsuits under Section 1983 in defiance of generations of this Court's decisions like *Felder* and *Patsy* quoted earlier. Nothing the lower state courts can possibly do on remand can alter the federal question of whether a federal Section 1983 action can be shunted aside to await yet another round of exhaustion of state law administrative and judicial remedies.

Second, "there are those situations . . . where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." (*Cox*, 420 U.S. at 482-483)

Here, the federal issue has been finally decided: in California, the federal Section 1983 suit will have to wait until – if then – the newly announced state "*Kavanau* adjustment" proceedings have been concluded. That issue *cannot* change unless this Court intervenes. A decision by this Court would deal with the ultimate question of whether the Section 1983 compensation awarded by the trial court and affirmed by the Court of Appeal should be reinstated, or whether the plaintiffs can be diverted to a never-never land of what the court below candidly characterized as years of "bureacratic bungling."

To fail to address such a dispositive issue would, in this Court's words "seriously erode federal policy" (*Cox*, 420 U.S. at 483), that policy being that Section 1983 cases "exist independent of any other legal or administrative relief that may be available as a matter of federal or state

law. They are judicially enforceable *in the first instance"* (*Felder*, 487 U.S. at 148), not as a last resort, after exhaustion of repetitive, byzantine state-imposed administrative procedures. (See Pet., p. 8; see also the Amicus Curiae Brief of the American Assn. of Small Property Owners, pp. 5-6.) Without this Court's review now, that foundational precept of federal civil rights law will be swept away – at least in California, and in those states that may find her holdings persuasive.

CONCLUSION

There are two matters that arise from this Petition that are not rationally contestable:

- First, this Court's decisions in *Patsy* and *Felder* properly deny states (and that includes state courts) the power to precondition Section 1983 actions on compliance with state-law remedies, whether administrative or judicial. Section 1983 provides a remedy in the first, not last, instance.
- Second, the California Supreme Court's majority defiantly disregarded this long- and well-settled line of this Court's authority, and has sent these plaintiffs – whose mistreatment by the City's "bureaucratic bungling" the court below expressly acknowledged – on an economically back-breaking wild goose chase, in pursuit of illusory "remedies" that paramount federal law forbids.

Accordingly, Petitioners pray that a writ of certiorari issue, that the erroneous decision below be reversed, and

that the federal rights of Californians (the same as other Americans) under Section 1983 be restored.

Respectfully submitted,

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